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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

CUMBERLAND FARMS, INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

ALLAN VAN GESTEL,
Counsel of Record,
GOODWIN, PROCTER & HOAR,
Exchange Place,
Boston, Massachusetts 02109.
(617) 570-1000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

100 pp

In the courts below the defendant, appellant was referred to as "Cumberland Farms of Connecticut, Inc." By a corporate reorganization effective September 30, 1984, Cumberland Farms of Connecticut, Inc. was merged into Cumberland Farms, Inc., the petitioner here. Cumberland Farms, Inc. is a Delaware corporation privately held and has no parents, subsidiary or affiliate as designated in Supreme Court Rule 28.1.

Questions Presented for Review.

I. Whether the takings clause of the Fifth Amendment prohibits the insistence by the United States Army Corps of Engineers that wetlands dredged and filled for agricultural purposes without a permit in violation of § 404 of the Clean Water Act first must be physically restored to their condition in July, 1977, and productive farmland thereby destroyed, before the Corps of Engineers must accept, consider and act upon an application for an after-the-fact permit?

II. Whether the takings clause of the Fifth Amendment prohibits the issuance of an injunction by a United States District Court which mandates that wetlands dredged and filled for agricultural purposes without a permit in violation of § 404 of the Clean Water Act first must be physically restored to their condition in July, 1977, and productive farmland thereby destroyed, before remanding the matter to the United States Army Corps of Engineers with directions to accept, consider and act upon an application for an after-the-fact permit?

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

This petition flows from a decision by the United States District Court for the District of Massachusetts captioned *United States of America* v. *Cumberland Farms of Connecticut, Inc.*, reported at 647 F. Supp. 1166 (D. Mass. 1986) (set forth in Appendix A), and affirmed by the United States Court of Appeals for the First Circuit in an opinion bearing the same caption reported at 826 F.2d 1151 (1st Cir. 1987) (set forth in Appendix B). A petition for rehearing en banc was denied by the Circuit Court on September 18, 1987.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 18, 1987. This petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved.

This petition involves the dredge and fill permit requirements of § 404 of the Federal Clean Water Act, 33 U.S.C. § 1344, and related regulations dealing with after-the-fact permit applications. Because of their length, the statute and regulations are set forth in the Appendix hereto at 68a and 82a.

Statement of the Case.

On August 18, 1987 a panel of the First Circuit Court of Appeals affirmed in its totality the rulings of the U.S. District Court for Massachusetts (Hon. William G. Young) in this complex case in which the Federal government sought civil penalties and injunctive relief for violations of § 404 of the Clean Water Act, 33 U.S.C. § 1344. *United States* v. *Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151 (1st Cir. 1987) (*see* App. 39a). The extensive and detailed opinion of the District Court appears at 647 F. Supp. 1166 (D. Mass. 1986) (*see* App. 1a).

While the petitioner is disappointed with a number of the rulings affirmed by the Circuit Court, it presses here only one which, it sincerely believes, has consequences that reach far beyond the dispute between the parties.

At the beginning of his opinion, District Judge Young, quoting Robert Frost, set a tone for the conflict before the court.

See 647 F. Supp. at 1168 (App. at 2a). After noting his duty to balance the two enduring values of the needs of the present and the dreams of the future he said:

> [T]his case involves a test of what the nation has learned in the last three hundred years. On the one hand, Congress has signaled its desire to preserve our wetlands, an intent now codified in rather sweeping legislation, *see* 33 U.S.C. ch. 26, § 1251 et seq., and further codified in detailed and extensive regulations administered by the United States Army Corps of Engineers, *see* 33 C.F.R. ch. 11, § 320 et seq. On the other hand, the Court takes judicial notice that even in this industrial or post-industrial time, this country as breadbasket of nations represents the greatest agricultural success story in the history of the world.

647 F. Supp. at 1168-69 (App. at 3a).

It is an aspect of the resolution of this conflict, aggravated particularly by the Corps of Engineers' dilatory and stumbling application of its jurisdictional mandate, that forms the basis for this petition. Cumberland Farms of Connecticut, Inc. is not the only agricultural enterprise in Massachusetts ensnared by the Corps' deceptive inaction, now affirmed by the rulings of the District and Circuit Courts. Cumberland has learned that several Massachusetts cranberry growers just recently have received notices from the Federal government that their activities in expanding their bogs have, since 1977, like Cumberland's expansion of its cornfields, violated the dredge and fill permit requirements of § 404 of the Clean Water Act. A copy of one such notice is included in the appendix to this petition (App. E at 84a).

A brief recitation of Cumberland's history on the land in question reveals the problem. Starting in 1972 and continuing for *five* years until 1977 Cumberland drained nearly 1,000 acres of swampland and converted it to cornfields. 647 F. Supp. at 1170 (App. at 6a-7a). As the District Court found, this was an agricultural exercise practiced in Plymouth County, Massachusetts, since the arrival of the colonists in 1620 — and, in Cumberland's situation, enjoying the support of the Department of Agriculture of the U.S. government. *Id.* Until July of 1977 it also was perfectly legal and required no permit. In 1977, through the adoption of expanded regulations, the Corps of Engineers was given responsibility for regulating certain aspects of this kind of agricultural activity if it occurred in wetlands. 647 F. Supp. at 1171 (App. at 8a-9a). Insofar as Cumberland's activities were concerned, and even more so for its neighboring cranberry bog operators, the adoption of its regulations and affirmative action to enforce them by the Corps of Engineers were hardly simultaneous. It was not for another *six* years, until 1983, that the Corps first indicated to Cumberland that it required a permit for its cornfield conversion project. 647 F. Supp. at 1172 (App. at 10a). By then Cumberland had been involved in the project for *eleven* years.

The District and Circuit Courts have suggested that Cumberland's ignorance of the 1977 law provides no excuse. This in the face of the Corps' own confession of uncertainty as to whether it had or was asserting jurisdiction until December of 1984.

> In sum, this Court finds that a year-and-a-half after the initial report [in 1983] of alleged violations of the Clean Water Act, so far as this record shows, the Corps of Engineers had not yet determined whether it had jurisdiction and no state regulation of the area was in effect.

647 F. Supp. at 1173 (App. at 12a).

> Moreover, the first time the Corps asserted jurisdiction over the Great Cedar Swamp was by Colonel Siple's letter of December 28, 1984 to Cumberland.

647 F. Supp. at 1178 (App. at 24a).

> Without the most extensive and careful analysis of the background of the regulatory scheme, no reasonable person in Cumberland's position would conclude that he did not enjoy the protection of the Unasserted Jurisdiction Permit, at least until December 28, 1984.

647 F. Supp. at 1184 (App. at 36a).

Despite this history, the District and Circuit Courts ruled against Cumberland and set precedent against many others on the issue of the Corps' power to demand complete restoration before even considering an after-the-fact permit. *E.g.*, 826 F.2d at 1162-63 (App. at 61a). Under the best of circumstances it makes little sense to allow, indeed by regulation to encourage, after-the-fact permit applications if, before the Corps will consider them, the property must be restored to its original state. What, then, if the permit is granted? A silly renvoi, with a great waste of time, energy and resources.

Here, it is much worse. Cumberland was *twelve* years into the project before the Corps finally determined that it had and would assert jurisdiction — and only after first representing to the District Court as late as September, 1983 that it had not yet determined whether it was going to assert jurisdiction over the property. 647 F. Supp. at 1173 (App. at 11a-12a). The Corps' own inaction from July, 1977 to December, 1984, highlighted as it was by the Corps' representations to the Court in 1983, makes clear that the "appropriate remedial work, if any," called for by 33 C.F.R. § 326.4(c) before consideration of an after-the-

fact permit application, was far less than complete restoration of the area involved.

To leave matters as the lower courts have ruled seems as inconsistent with logic as it is glaring in inequity, and it sets a precedent that could seriously injure the Massachusetts cranberry industry, as well as other agricultural activities all across the country. Even the trial court found itself constrained to note the impropriety of the Corps' action by declining to impose any penalty for Cumberland's activity prior to 1984. "The Corps' own opaque regulation, 33 C.F.R. § 330.3, so vitiates any claim of legal culpability on the part of Cumberland prior to December 28, 1984 that this Court, as matter of discretion, refrains from imposing any penalty for actions prior to that date." 647 F. Supp. at 1184 (App. at 35a).

Cumberland, and apparently many Massachusetts cranberry growers, are to be held strictly accountable despite their ignorance of the law, and be deprived of benefit because of their similar lack of understanding of an "opaque" and facially confusing regulation. At the same time, the creators of the confusion, whose own actions led the local farming community to proceed with some degree of comfort, are not even required to review an after-the-fact permit request until the work which would be performed if that permit is granted is first destroyed. The permitee, if successful, would then be obliged to rebuild his cornfields or cranberry bogs all over again. It is one thing to condition consideration of an after-the-fact permit on the taking of emergency steps to preserve the status quo. It is quite another to insist upon destructive work that attempts to reverse it. Destroying cornfields and cranberry bogs before deciding whether they can ultimately be built seems hardly a sensible application of the law.

Reasons for Granting the Writ.

In addition to the logical and practical absurdity of mandating the destruction of valuable agricultural property before deciding whether to permit its existence, the requirements of the Corps of Engineers and the injunction of the District Court run squarely into the prohibitions found in the takings clause of the Fifth Amendment to the United States Constitution. Unlike the putative constitutional problem presented in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the actions of the agency and the mandate of the court present an actual constitutional violation. To destroy the cornfields in issue, and set a precedent which will permit the destruction of agricultural land throughout the country, affects the taking — but for two significant reasons the constitutionally mandated compensation may not be available.

First, it requires no special knowledge or extensive citations to suggest that the economic status of many of the nation's farmers is not strong. Thus, the very costs of destroying operative farmlands and the resulting deprivation of crops therefrom during the period while the Corps of Engineers considers an after-the-fact permit request will, in many instances, bankrupt the parties subject to such a requirement. In effect, those parties will never be able to exercise their constitutional right to compensation for a taking because the very government against whom that right is provided will have taken away their means to do so. The effect will not only be unfair in the extreme to the farmers to whom it applies, but could have a serious impact on the rest of the nation which relies on the product of those farms.

Second, in the instance here presented, the petitioner requested the court, after determination of the jurisdictional questions, to remand the case to the agency for appropriate public

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hearings and the consideration of an after-the-fact permit application. Instead, the court has ordered, under the threat of a substantial punitive fine and contempt, the destruction of the productive farmland before any after-the-fact permit is considered.

It is far from clear that the law permits a claim against the United States under the Tucker Act, 28 U.S.C. § 1491, or under any other provision, when the action that causes the "taking" comes about as a result of an order of a district court. Even should a claim be available, a court should not be permitted to engage in an activity that runs counter to a protection provided in the Constitution.

The taking issue in the wetlands context assumes special meaning when the government's actions have a direct and damaging effect on one of man's most truly vital and necessary activities, the cultivation and production of food products. This case joins the issues between the desire to preserve wetlands and the absolute need to maintain the nation's agricultural institutions, as the trial judge so eloquently noted in his incantation of Robert Frost at the start of his opinion. 647 F. Supp. at 1168 (App. at 2a).

No farm can survive without water. It is, therefore, hardly surprising that almost every farm in the country exists in or near the "waters of the United States" as that phrase has come to be interpreted under § 404 of the Clean Water Act and the regulations promulgated in connection therewith. See, e.g., *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 511 F. Supp. 278, 288 (W.D. La. 1981), *aff'd in part and rev'd in part, sub nom. Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). "One of most vexing problems facing environmental and land use regulations is the Fifth Amendment limitation that government shall not take private property for a public

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use without just compensation." Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 Kan.L.Rev. 539, 553 (1986).

The confusion that remains on the Fifth Amendment taking issue in the wake of *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)[1] is faced squarely here. Paraphrasing Justice White's comments in *Bayside*, 474 U.S. at 127, while the mandate of the Corps of Engineers and the injunction of the trial court may fairly be said to advance legitimate government interests, they clearly deny an owner economically viable use of his land. Does such governmental action pass or fail the constitutional test? Does it constitute a taking for which the Fifth Amendment must provide relief? And, if no statute permits a claim for the acts of the court, can the Fifth Amendment be said to provide the base therefor?

Many more farmers than the petitioner here need to know if their work since July, 1977 in what might be characterized as the waters of the United States, is about to fall under the axe of the government's Clean Water Act. Will they be told, like the petitioner here, that they might be entitled to an after-the-fact permit, but only if they first destroy their farms before making an application?

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[1] *See, also, Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 185-194 (1985); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 636-661 (1981).

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Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

ALLAN VAN GESTEL,
Counsel of Record,
GOODWIN, PROCTER & HOAR,
Exchange Place,
Boston, Massachusetts 02109.
(617) 570-1000

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Appendix A.

UNITED STATES of America, Plaintiff,

v.

CUMBERLAND FARMS OF CONNECTICUT, INC., Defendant.

Civ. A. No. 85-0846-Y.

United States District Court,
D. Masachusetts.

Oct. 16, 1986.

United States brought action against farming corporation, charging violations of Clean Water Act. After issuing injunction, 644 F.Supp. 319, the District Court, Young, J., held that: (1) farming corporation was not exempt from Corps of Engineers permit requirements; (2) farming activities could not avoid "recapture" under provision of Clean Water Act; (3) certain "nationwide" permits did not excuse farming corporation from obtaining specific or individual permit; (4) restorative injunction was not required to be crafted to protect single-family dwellings erected adjacent to site after commencement of farming operations, but was required to be crafted to protect cranberry bogs which existed prior to governmental regulation of area; (5) farming corporation was not subject to civil penalty for operation engaged in prior to cease and desist order from Corps of Engineers; but (6) corporation was liable for civil penalties for actions taken in direct defiance of cease and desist order.

Ordered accordingly.

. . . . . .

Richard E. Welch, III, Asst. U.S. Atty., Boston, Mass., for plaintiff.

Allan Van Gestel, Marjorie R. Corman, Goodwin, Procter & Hoar, Boston, Mass., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

YOUNG, District Judge.

At the inauguration of President Kennedy, Robert Frost read a poem which began:

> The land was ours before we were the land's. She was our land more than a hundred years Before we were her people.

Frost, R., "The Gift Outright," *The Poetry of Robert Frost*, Lathem, E. ed., at 348 (1969). In imagery strikingly parallel to the facts of this case, Frost evokes memories of the colonists who, without benefit of bulldozers and earth moving machinery, cleared the land in order to plant. Cutting away the bark, the colonists girdled the trees until they died and could be felled, moving the logs off the land and rendering it fit for agriculture. That done, they ditched the land to improve its drainage.

I. Findings of Fact

Wetland soil is particularly attractive for agriculture since, in any wet or mucky soil, vegetation decomposes less rapidly

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[1] The Findings of Fact and Conclusions of Law in this action were originally dictated from the bench immediately following the trial. The Court reserved the right "to grammatically and editorially tighten up and recast the findings of fact in a more understandable fashion . . . and . . . to expand on the analysis of the law . . . supply[ing] other and further . . . citations." While the dictated findings and rulings were sufficient to govern the course of the litigation, serve the litigants, and form the groundwork for any appeal, the case warrants a written opinion. This is that opinion.

than in the uplands. Termed "anerobic" to signal a lack of oxygen, this soil is rich in organic nutrients, its peat-like composition being ideally suited for planting. Throughout history farmers sought out this soil to clear and to cultivate. Such clearing has consequences, however, and today such traditional land use poses the single grèatest threat to the nation's wetlands. As a consequence, the Court must now balance two enduring values: serving the needs of the present and safeguarding the dreams of the future.

In fact, it can be said that this case involves a test of what the nation has learned in the last three hundred years. On the one hand, Congress has signaled its desire to preserve our wetlands, an intent now codified in rather sweeping legislation, *see* 33 U.S.C. ch. 26, § 1251 et seq., and further codified in detailed and extensive regulations administered by the United States Army Corps of Engineers, *see* 33 C.F.R. ch. 11, § 320 et seq. On the other hand, the Court takes judicial notice that even in this industrial or post-industrial time, this country as breadbasket of nations represents the greatest agriculturual success story in the history of the world.

The Great Cedar Swamp

This case involves an area of land lying partly in the town of Halifax and partly in the town of Middleborough in southeastern Massachusetts. Consisting of approximately 2,000 acres, the land is now, and has been at all material times, known as the Great Cedar Swamp. From a saddle between two rolling hills to the south flow two brooks which, in 1977,[2] meandered northward encompassing between them the majority of the land known as the Great Cedar Swamp. The stream

[2] The year 1977 is important since the United States concedes for the purposes of this action that its goal of restoring the land reaches back in time no further than the state of the land as it existed on July 1, 1977, the effective date of the regulations which it claims subjected the Great Cedar Swamp to Corps of Engineers jurisdiction.

on the east is known as Raven Brook, and the stream to the west is known as Bartlett Brook. In 1977, the brooks snaked through the Swamp until each emptied into the Winnetuxet River to the north. Then and now, the Winnetuxet empties on the west and southwest into the Taunton River and the Taunton, in turn, empties into the Atlantic ocean. In fact, the Taunton is tidal as far north as the City of Taunton, some five to ten miles away from the Great Cedar Swamp.

In 1972 the area was covered in part by a soil of peat and in part by a soil characterized as muck, either shallow or deep. These soils are classified as "hydric," i.e. wet soil kept constantly moist by an high water table. Test borings taken in 1985 at various locations in the area confirm that, below the 30 foot contour line, layers of peat and sand or silt rest on a lower layer of clay. A brickyard immediately northwest of the site confirms the presence of clay in the subsoil. Soil borings coupled with expert testimony confirm that a majority of the acreage in question is or was a wetland, although areas within the original 2,000 acre swamp, roughly those above the 30 foot contour, are not now and, indeed, could not ever have been characterized as wetland. Many of these non-wetland heights, however, were at one time surrounded by wetland.

In 1977, the Great Cedar Swamp was a typical fresh water swamp. Portions remain so even today. Scientists term the swamp areas "pollustrian wetland" because they are dominated by sedges, ferns, moss shrubs, cattails, bullrushes and distinctive varieties of trees. The ground cover of the Great Cedar Swamp included sphagnum moss, boneset, blue vervain, water-cress, smartweed, tear-thumb, swamp aster, bedstraw, reed canary grass, pond lilly, manna grass, broomsedge, bur-reed, pondweed, water weed, common duckweed, greater duckweed, pickerelweed, larger blue flag, arrow-arum, skunk cabbage, rush, beakrush or spike-rush, softstem bullrush, wood-grass bullrush, inflated sedge, silvery sedge, cattail, and

royal fern. These plants grew in and around such shrubs as black alder, poison sumac, swamp azalea, grass-leaved willow, mountain holly, smooth alder, silky dogwood, and sweet gale. Although recognizing that the catalogue above stems from expert studies done in 1985, the Court infers that this flora, indigenous to swamp lands, was found in the area in 1977.

Beyond hosting plants and trees, the swamp and its adjacent damp woodlands support a large variety of bird life. Bird nesting grounds have been noted in this area for at least 35 years. Birds present today include the Ruffed Grouse, Downy and Hairy Woodpeckers, the American Crow, the Blue Jay, and the Black-capped Chickadee. Less extensive, but also present in the area over the past 35 years are the Veery, the Northern Waterthrush, the Northern Yellowthroat, and the Canada Warbler. The Northern Waterthrush and Canada Warbler are rarely found outside white cedar swamps.

The area also shelters the Red-Tailed hawk which the Court finds to have been present for at least the last 20 years. On several occasion, the Eastern Bluebird has been found breeding in Red Maples in the swamp.[3]

Other animal life is now, and was in 1977, prevalent in the Great Cedar Swamp. Such animal life includes deer, raccoon, skunk, and frogs—evidence of which the court observed on a view taken on March 17, 1986. The Court also saw a pheasant but, on the totality of the record before it, cannot infer the presence of pheasant in the area beyond the immediate time frame of the view.

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[3]On May 8, 1977, an experienced ornithologist observed two Peregrine Falcons chasing a Northern Goshawk. The Court concludes, however, that the Great Cedar Swamp is not a critical nesting area for the Peregrine Falcon inasmuch as they have been successfully induced to nest on the roof of this very courthouse in Boston where they live by feeding on the abundant pigeon population which they catch in and above the city streets.

On the present record, the Court cannot conclude that, prior to Cumberland's acquisition, any significant portion of the area was ever utilized for agricultural purposes, although there was a mill in or close to the area at one time. During World War II, the armed forces used a center strip of the swamp for a strafing run. Even recent aerial photographs capture a difference in vegetation growth which still marks the course of the strafing run.

In 1972, V.S. Hasiotis Incorporated ("Hasiotis") purchased the land in question. Shortly thereafter, Hasiotis leased the land to a related corporation owned by roughly the same group of shareholders, Cumberland Farms of Connecticut, Incorporated ("Cumberland"). At or about the time of purchase, Cumberland commissioned studies relative to possible use of the site for agricultural purposes. The Court finds that these studies would indicate to a reasonable farmer that, for the area to become productive farmland, the trees would have to be removed from the better portion of the land. Moreover, the level of the swamp would have to be lowered significantly by ditches which could both irrigate the land when dry and drain the land when excess water inundated the soil. These studies would indicate to a reasonable farmer that once cleared and drained, the mucky or peaty soil would be more than adequate for farming. In short, the land was ripe for conversion to agriculture, following methods little changed from colonial times.

Beginning in 1972 and working roughly from north to south, Cumberland endeavored to bring the Great Cedar Swamp into productivity as arable farmland. Sporadic but persistent, Cumberland's activities derive from its corporate resources and its corporate need. Clearing has occurred on a broad front both on the eastern and western sides of Raven Brook, reaching even to the far side of Bartlett Brook as well. Adjoining Fuller Street, a large field has been cleared, this field marking the approximate southernmost extension of cleared area. By 1977,

a finger of cleared land just to the west of Raven Brook had already appeared. Today, areas about the southern tip of land have also been cleared and used as farmland.

By 1977, Cumberland had already installed a significant network of drainage ditches in the northernmost area and had straightened the meandering course of Raven Brook from approximately the midpoint of the property southward to the terminus of a dirt-packed farm road. In 1977 and 1978, the network of ditches on the western side of the property had extended only so far as the cleared land, and Bartlett Brook south of the cleared area still followed its normal meandering course.

From 1977 through 1985, Cumberland continued the process of clearing and ditching. Raven Brook was straightened throughout its entire length and Bartlett Brook, having earlier been straightened only in the portion where the land had been cleared, was straightened to the southern terminous of the property. In 1983, the headwaters of the two streams were joined by a ditch. The western boundary of the swampy portion of the site was ditched in 1983, all this work being performed by bulldozers and backhoes. Two farm roads running parallel to Bartlett and to Raven Brook were in place by 1985. Over the period 1978 through 1985, Cumberland converted 674.4 acres of wetland or cut-over wetland to agricultural use. Cumberland cut down the trees with power saws, skidding the trunks out of the area in a normal lumbering operation. Cumberland then bulldozed the stumps and root systems in a process called scarification, removing in the process some of the topsoil. Once cleared and leveled, a layoer of manure prepared the land for actual planting.

Jurisdiction of the Army Corps of Engineers

At approximately the time that Cumberland Farms acquired the land on which the Great Cedar Swamp exists, the United

States enacted various legislation designed to free the waters of the United States from pollution. In 1972, the United States, acting through the United States Army Corps of Engineers, to whom the task of regulation and supervision had been delegated, interpreted that mandate to deal only with the navigable waters of the United States. Manifestly, none of the water within the land here in issue is navigable.

In 1975, however, a United States District Court, sitting in the District of Columbia, held that the Corps of Engineers had too narrowly construed its mandate in light of the statutory language and directed the Corps to expand its regulations to embrace other non-navigable waters that could affect interstate commerce. *N.R.D.C., Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975). The Corps complied and, in 1975, issued interim regulations which asserted authority under § 404 of the Clean Water Act as it then existed, 33 U.S.C. 1344, as amended through P.L. 92-500, § 2, 86 Stat. 884, over waters not actually navigable. This assertion of control engendered considerable Congressional opposition. The controversy came to a head during Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving interim improvements within the existing framework of the Act. Much of the controversy focused on a specific exemption for existing agricultural activities. But, as the United States Supreme Court has pointed out, in the end Congress acquiesed in the broad administrative construction adopted by the Corps. *United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

This Court notes that the scope of the Corps' asserted jurisdiction over wetland was specifically brought to Congress' attention and Congress rejected measures designed to curb the Corps' jurisdiction, in large part because of Congressional concern that protection of wetlands would be unduly hampered by a narrowed definition of navigable waters. *Id.* at ___ U.S.

at ___, 106 S.Ct. at 461-65, *see also* S.Conf. Rep. No. 92-1236, p. 144 (1972) U.S.Code Cong. & Admin.News 1972, pp. 3668; 118 Cong.Rec. 33756-33757 (1972) (statement of Rep. Dingell). Possessed, then, of this broader authority to regulate, the Corps granted certain nationwide permits which exempted some activites from the requirement of obtaining specific permits to dredge or fill specific areas of the waters of the United States. Apparently oblivious both to this regulatory framework and the possibility of exemption under a nationwide permit, Cumberland Farms continued to drain, clear, and fill portions of Great Cedar Swamp.

On March 2, 1983, Ruth Ellen Geoffroy, a member of the Middleborough Conservation Commission, visited the property in response to complaints that the Great Cedar Swamp was being drained. During that visit Geoffroy saw a backhoe working along Bartlett Brook in an area not yet converted to cornfields. John Peck, Cumberland's Vice President for Operations and superintendent in the area, ("Peck"), informed her that Cumberland had recently constructed a drainage ditch along the perimeter of its property in the wooded area and was in the process of constructing an additional drainage ditch running more or less east and west within the wooded area itself. Geoffroy's own observations confirmed these admissions and revealed red maples, recently cut, their stumps not yet moved, as well as disturbance of the mucky earth in the brook by the backhoe.[4]

Disturbed by what she had seen, Geoffroy returned on March 10th and March 16th to take additional photographs of the Bartlett and Raven Brook areas and the roadways which Cumberland had run along their banks. Soon thereafter, she com-

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[4] The Court notes that at the time of Geoffroy's visit in March, 1983, two inches of rain had just fallen on southeastern Massachusetts, and the Court infers that the water table was as high as it ever routinely got in the area in question.

plained to the Massachusetts Department of Environmental Quality Engineering and the United States Corps of Engineers. Her complaints were the first indication that the Corps had of alleged violations of the Clean Water Act by Cumberland in the Great Cedar Swamp.

The Corps acted promptly in light of these complaints and, on April 15, 1983, Lieutenant Colonel Arthur N. Rappaport, Deputy Division Engineer of the Corps of Engineers ("Rappaport"), wrote Peck a letter noting that discharges were apparently being made into the waters of the United States. Rappaport pointed out that Cumberland had never sought a permit for such discharges and asserted the jurisdiction of the Corps over the area. The letter expressly stated that Cumberland Farms should not perform any further work within the areas subject to Corps jurisdiction until federal authorization was received. The Corps recommended that exposed stream banks along Bartlett and Raven Brooks be stabilized and requested further, detailed information. On May 4, 1983, Cumberland responded by taking the position that its activities fell within the agricultural exemptions set forth in 33 U.S.C. § 1344(f)(1)(A), (C), and (E) and maintaining that it had not made any discharges into the waters of the United States.

Subsequent to the first notification of a complaint, and at all material times thereafter, Cumberland has in an appropriate and reasonable fashion permitted access to its land for inspection of its activities. On April 3, 1983, Elizabeth Ann Koulaheras, a Senior Marine Fisheries Biologist for the Massachusetts Department of Environmental Quality Engineering, inspected the property and observed an area of cornfield being extended by bulldozing earth into a swamply wetland, destroying the process the sphagnum moss, swamp azalea, cattails, and other flora that grew there naturally.

On April 5, 1983, Janet Clare O'Neill, a Senior Staff Wetlands Engineer employed by the Corps of Engineers ("O'Neill"), made

a general survey of the area. Although she did no detailed study, O'Neill concluded that the area was in fact a fresh water wetland subject to the jurisdiction of the Corps pursuant to the Clean Water Act. This determination was based upon her observation of those forms of plant life which grow only in hydric soil. O'Neill observed also that various brooks had been straightened from their normal meandering course. Some of this work appeared recently completed, while other modifications marked by eroding banks collapsed into the water appeared to have been completed some time in the past.

Without waiting for further Corps' action, Cumberland made a preemptive strike on June 10, 1983, commencing in this Court an action against the Secretary of the Army, the Chief of Engineers, and the Corps of Engineers for declaratory judgment seeking to vindicate its interpretation that its land was not within the jurisdiction of the Corps. Approximately a month later, on July 8, 1983, the Department of Environmental Quality Engineering commenced an action against Cumberland Farms in the Massachusetts Superior Court sitting in the County of Suffolk seeking to prevent what it termed violations of the Massachusetts Wetland Protection Act, *See generally* Mass. Gen. Laws ch. 131, § 40, and requesting immediate injunctive relief. At the time of the commencement of this action, Cumberland had almost 1,400 acres of land under cultivation and was preparing to cultivate the remaining five hundred acres. In both the federal and state actions, Cumberland took the position that it was exempt from regulation because the land was in agricultural use. *See* 33 U.S.C. § 1344(f)(1) and 310 Code of Massachusetts Regulations, § 10.04 (1983).

On September 9, 1983, the Corps moved to dismiss the federal action on the ground that it had not yet determined whether, in fact, it was going to assert jurisdiction over the property. The Corps argued that the suit brought by Cumberland was premature and improvident until such time as the

Department of the Army, through its Corps of Engineers, actually asserted jurisdiction, thus establishing a genuine controversy. On the record now before it, the Court finds that move by the Corps of Engineers totally inexplicable in view of the Rappaport letter of April 15, 1983.

Agreeing with the position taken by the Corps, another judge of this court dismissed the federal action on May 25, 1984. In the same time frame, the Massachusetts suit was reported by a justice of the Superior Court to the Massachusetts Appeals Court. On October 23, 1984, that court held that the action by the Massachusetts Department of Environmental Quality Engineering was premature because, under the Massachusetts Wetlands Protection Act, such action ought commence with the local community, advancing to the courts only if the litigants were dissatisfied with the determination of the local conservation commission. *Department of Environmental Quality Engineering v. Cumberland Farms of Connecticut, Inc.*, 18 Mass. App. Ct. 672, 469 N.E.2d 1286 (1984).

In sum, this Court finds that a year-and-a-half after the initial report of alleged violations of the Clean Water Act, so far as this record shows, the Corps of Engineers had not yet determined whether it had jurisdiction and no state regulation of the area was in effect. The Court finds that the matter was thereafter brought before the local conservation commissions in both Halifax and Middleborough where each community individually determined that, under Massachusetts law, the entire Great Cedar Swamp was exempt from local regulation under the Massachusetts exclusion for agricultural use.

This matter again came to the attention of the Corps in December, 1984, apparently through a press clipping mentioning the Corps. On December 23, 1984, Lieutenant Colonel Edward D. Hammond, acting for Colonel Carl B. Siple, the Division Engineer, communicated with counsel for Cumberland stating unequivocally that the Corps was asserting juris-

diction over the area in question, pointing out alleged violations of the Clean Water Act, and demanding that eight interim protective measures be undertaken immediately. This unequivocal assertion of jurisdiction and demand for action led to a series of meetings and eventually resulted in the erection of a culvert with sluice gates in the Bartlett Brook. Evidently, because either the culvert was too small or because it was inadequately erected, it did not channel the water through its course, thus rendering the sluice gate useless.

Beyond that, however, Cumberland objected to the interim protective measures because, as events bore out, operational sluice gates would have had the effect of inundating certain areas of Cumberland's cornfields. Although this was the effect intended by the Corps in order to restore the wetlands, inundation would have reduced Cumberland's acreage under cultivation. Cumberland therefore balked and officially requested a retroactive permit to validate the ditching and filling in which it had engaged from July 1, 1977 to date. The Corps refused to issue such a permit or even entertain Cumberland's application until such time as Cumberland implemented the interim protective measures which the Corps desired. The matter at a standstill, Cumberland removed the culvert from Bartlett Brook and left it lying on the side of the brook where it remains to this day.

The View

Pursuant to this action which commenced in June, 1985, the Court took a view of the Cumberland property on March 17, 1986. The view involved an aerial overflight and circling by helicopter, driving the perimeter and, on at least two occasions, a hike of two or three hundred yards into the interior of the Cumberland property. The factual matters which may be inferred from the view all corroborate the facts drawn from the testimonial and documentary record. The Court observed numerous white pine in the area, their growth consonant with

a drained and receding wetland. The Court also observed a type of sedge, probably the tussock sedge. Although it was March, a wet time of the year, the level of the swamp appeared to be a good two or three feet, if not more, below the evident root system. Expert testimony confirmed this impression. In an upland area close to a swampy section, the Court also noted a plant known as the common mullein or *verbascum thapsis* which expert testimony established to be an invasive plant, a type which enters an area as the wetland recedes. Earlier, the Court adverted in its findings to inferences drawn about the historic animal population from testimony concerning current fauna. The Court's view confirmed such evidence even though its survey took little more than two-and-one-half hours and primarily involved the perimeters of the property. The Court concludes that both bird and animal life are abundant in the area.

Further factual findings are set forth, where warranted, in the course of the discussion which follows.

II. Conclusions of Law

[1] As remarked above, this litigation grows out of Cumberland's desire to farm its wetland more productively and the Army Corps of Engineers' duty to regulate wetland use under the Clean Water Act, 33 U.S.C. §§ 1251-1376. Unfortunately, these interests are not compatible.[5] The applicable statute seeks to eliminate "the discharge of pollutants into navigable waters," 33 U.S.C. § 1251(a)(1) (1978), and "to restore and maintain the chemical, physical and biological integrity of the nation's waters," 33 U.S.C. § 1251(a) (1982). These purposes are "achieved by compliance with the Act, including compliance with the permit requirements." *Weinberger v. Romero-Bar-*

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[5] *See generally* Caplin, *Is Congress Protecting Our Water: The Controversy Over Section 404, Federal Water Pollution Act Amendments of 1972*, 31 U. Miami L.Rev. 445 (1977).

celo, 456 U.S. 305, 315, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1982). The permit system is administered by the United States Army Corps of Engineers which regulates the discharge of dredged or fill materials into "navigable waters." *See* 33 U.S.C. §§ 1311, 1344 (1982).

The Act defines navigable waters as "waters of the United States" and this definition includes wetlands. 33 C.F.R. § 323.2(a) (1985). A unanimous Supreme Court recently upheld the Corps definition of wetlands:

> [Wetlands] means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalance of vegetation typically adopted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1985), *United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (construing the 1977 definition, the Court noted that the 1982 definition is "substantially identical.") *Id.* 106 S.Ct. at 458. Addressing itself directly to § 404, the United States District Court for the District of Columbia interpreted the term "navigable waters" to "assert . . . federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and refused to limit the term to "the traditional tests of navigability." *N.R.D.C., Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C.1975). In keeping with the breadth, the Supreme Court recently held that "navigable waters" includes water areas "adjacent to" navigable water. *United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

As relevant to the instant matter, the statute regulates the discharge into wetlands of pollutants, a term which includes

"dredged soil . . . rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6) (1978). Federal regulation is achieved through a permit system, a process which is "[t]he cornerstone of the . . . scheme for cleaning up the nation's waters . . .," *United States Steel Corp. v. Train*, 556 F.2d 822, 829 (7th Cir.1977), as cited in *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir.1985). Apparently, however, Congress sought to calm fear that the decision in *N.R.D.C., Inc. v. Callaway* would result in an unlimited expansion of the Corps' jurisdiction by providing for the specific exclusion of certain activities from regulation by permit. Accordingly, the statute now excludes or exempts certain activities as follows:

> (f) Non-prohibited discharge of dredged or fill material
> (1) Except . . . the discharge of dredged or fill material
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> . . . . .
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> . . . . .
>
> (E) for the purpose of construction or maintenance of farm roads or forest roads . . . where such roads are constructed and maintained, in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.
>
> . . . . .
>
> is not prohibited by or otherwise subject to regulation under this section. . . .

33 U.S.C. § 1344(f)(1), added December 27, 1977, Pub.L. 95-217, § 67(b), 91 Stat. 1600. To apply these standards, Cumberland's conduct must be analyzed by a contextual review of its "total activities." *See Avoyelles Sportsmens' League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir.1983). The characterization of Cumberland's current farming turns on an analysis of whether such activities are "established and continuing." *Id.* at 925. At least in passing, Cumberland argued that its agricultural use has historical antecedents that bring the site under the exemption as "established and continuing" farming activity. This argument fails for several reasons.

First, this Court has found no persuasive evidence that any portion of this site was farm land prior to Cumberland's acquisition and, however compelling the evidence of Cumberland's purchase of the site for agriculture and its actually farming a portion of the site prior to the effective date of federal regulation, the history of a site is not dispositive of the legal issues facing the Court. *United States v. Ciampetti*, 20 E.R.C. 1926, 1933 (D.N.J.1984) ("[A]lthough the court is . . . fascinated by the history of the site . . . for purposes of the present controversy that history is of purely scientific value and is not dispositive of the legal issues before the court"). Second, the Fifth, Seventh, and Ninth Circuits have construed the Section 1344(f)(1) exemptions narrowly. *See United States v. Akers*, 785 F.2d 814, 819, 823 (9th Cir.1986); *United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 62, 88 L.Ed.2d 50 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 n.44 (5th Cir. 1983).

This narrow construction recognizes the statute's legislative history. Senator Edmund Muskie sponsored the legislation and his remarks are to be given substantial weight. *See United States v. Akers*, at 819, citing *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295,

2304, 49 L.Ed.2d 49 (1976); *Environmental Fund, Inc. v. Costle*, 636 F.2d 1229, 1243 n. 48 (D.C.Cir. 1980). Senator Muskie explained:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 Leg.Hist. 474 (1977).[6]

[2] Moreover, even if Cumberland could establish that it is exempt from the permit requirements under § 1344(f)(1), it must also demonstrate that its activities avoid "recapture" under the provisions of 33 U.S.C. § 1344(f)(2). *See United States v. Akers*, 22 E.R.C. 1238, 1243 (E.D.Cal.1985), *aff'd* 785 F.2d 814 (9th Cir.1986). Section (f)(2), the "recapture provision," seizes upon certain activities which on their face appear exempt in order to bring them back under the statute. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d at 926 (5th Cir.1983). As a result, in order to be exempt from regulation, Cumberland's discharge must not only fall within (f)(1), but also must escape recapture by (f)(2).

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[6] Senator Muskie also remarked "[T]he exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body." 3 Leg.Hist. 475 (1977). *See also* Representative Harsha: Congress intended to exempt from the permit process only "narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body." 3 Leg.Hist. 420.

In relevant part, § 1344(f)(2), added Dec. 27, 1977, Pub.L. 95-217, § 67(b), 91 Stat. 1600 provides:

> Any discharge of dredged or fill material into navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced shall be required to have a permit under this section.

Many courts have found those activities which extensively change a wetland's hydrologic regime are subject to the requirement that a Corps permit be obtained before proceeding. *United States v. Akers*, 785 F.2d 814, 822 (9th Cir.1986); *United States v. Huebner*, 752 F.2d 1235 (7th Cir.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 62, 88 L.Ed.2d 50 (1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir.1983). As the manifest intent of Congress was to prevent the conversion of wetlands to dry lands, "the substantiality of the impact on the wetland must be considered in evaluating the reach of section (f)(2)." *United States v. Akers*, at 822. Reading the exemptions of § 1344(f)(1) narrowly and the recapture provision broadly, *United States v. Akers*, 22 E.R.C. 1238, 1243 (E.D.Cal.1985), *aff'd* 785 F.2d 814 (9th Cir. March 26, 1986), the Court holds that subsequent to July 1, 1977, Cumberland converted a wetland hydrologic regime and that such modifications required a permit.

In fact, Cumberland straightened and channelized both Raven and Bartlett Brooks, effectively draining the land. This project cannot be described as "minor," either individually or in a contextual analysis of Cumberland's "total activities." Rather, Cumberland's activities involve precisely what is prohibited: the wholesale modification of a major aquatic system having

an adverse effect, both individually and cumulatively. The statute prohibits Cumberland's actions because their demonstrable effect is to convert extensive areas of water into dry land, impede water circulation, and reduce the reach and size of the water body.

Cumberland has altered the hydrologic cycles once operative in the Great Cedar Swamp to the extent that, unchecked, Cumberland's development would have the effect of draining it completely. The Court rules the Cumberland property to be wetlands under the Corps' definition and further rules that no applicable statutory exemption applies. Accordingly, subsequent to July 1, 1977, Cumberland could lawfully engage in dredge and fill activities in those areas of the Great Cedar Swamp not then converted to agriculture only pursuant to a Corps of Engineers' permit.

[3] This analysis does not dispose of the matter, however, because Cumberland now argues that certain "nationwide" permits excuse it from obtaining a specific or individual permit.[7] *See* former 33 C.F.R. § 323.4-2(a)(1) (the "headwaters permit") and current 33 C.F.R. § 330.3(b) (the "unasserted jurisdiction permit"). The first authorizes the discharge of dredge or fill material into water, including wetlands, as long as the discharge takes place above the headwaters of a non-tidal river or stream. The second appears to exempt work undertaken in water bodies over which the District Engineer of the Army Corps of Engineers was not asserting jurisdiction at the time the activity occurred.

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[7] At one point in this litigation, Cumberland was asked by Interrogatory: "Do you contend that any of your activities in connection with the subject property qualifies for any nationwide permit pursuant to 33 C.F.R. Part 330 or any other general permit issued by the Corps of Engineers?" Cumberland Farms answered: "No." Interrogatory 42; Answer of Cumberland Farms to Plaintiff's First Set of Interrogatories, June 11, 1985. The United States does not, however, argue that Cumberland is estopped by these answers from pressing these arguments at trial. The Court, therefore, deals with them here.

The "Headwaters" Permit

The nationwide permit for "headwaters" allows discharges of dredged or fill material into "non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters." 47 Fed.Reg. 37146, as codified at 33 C.R.F. 323-4-2(a)(1) (1977), *see* 33 C.R.F. 330.5 (1985). The Court finds that in March of 1986, the cubic feet per second of water flow might be calculated at various points in the Cumberland Farms subject area by reference to the standard gauge in operation for many years. The standard gauge is located a short distance south of the intersection of the Winnetuxet and Taunton Rivers toward the ocean. While the Taunton River is tidal at least as far north as Taunton, its tidal nature has no effect on the standard gauge which measures a watershed of 260 square miles. The area drained averages a flow rate of 434 cubic feet per second. This works out to a flow rate of 1.7 cubic feet per second per square mile of contributing drainage area.

The Corps used this figure to calculate the cubic feet per second of the flow from more discrete watersheds up the Taunton, the Winnetuxet, and all of its tributaries, including Raven and Bartlett Brooks. Given a standard measure from the state farm gauging station of 1.7 cubic feet per second per square mile of contributing drainage area, it takes 2.9 square miles of drainage area to create a waterflow of five cubic feet per second. Inferentially, any drainage area draining less than 2.9 square miles of drainage area will have a flow of less than five cubic feet per second. Specifically, the Court finds that, in 1986, at the intersection of Raven Brook and the Winnetuxet River an average flow rate of 5.6 cubic feet per second exists over a drainage area of 3.2 square miles. At the point where Bartlett Brook drains into the Winnetuxet River, the water is moving at 8.2 cubic feet per second.

Cumberland Farms points out that it is hardly possible, and indeed the United States concedes as much, that at the point where the streams enter land owned by Cumberland Farms they are moving at a flow rate of five cubic feet per second. The Court concludes that the brooks must move at a rate less than five cubic feet per second where they enter the Cumberland property but finds that upon emerging the brooks are moving faster than the rate (five cubic feet per second) below which the headwaters permit would apply. Cumberland asks the Court to find the point in the swamp where the brook moves exactly at five cubic feet per second and apply the headwaters nationwide permit above that point, at least until December of 1984 when the regulations were amended to render this exemption inapplicable to Cumberland's activities. The Court declines to do so because such an attempt to fix a point would be sheer speculation. Moreover, the Court is not persuaded that this process lends itself to solution by a mathematical formula, simply by figuring backwards up through the various drainage areas as discerned from topographical maps. Rather, the court would need to return to the area and actually calculate the drainage area or obtain further expert evidence thereon. The Court declines to re-open the evidence and notes that Cumberland bears the burden of proving that its activities come within the ambit of a nationwide permit.

In any event, the United States argues that the headwaters permit excludes any action which would destroy or adversely modify a critical habitat of a threatened or endangered species. 33 C.F.R. § 330-5(b)(3). The evidence before the Court demonstrates that, although the Peregrine Falcon is an endangered species, the Great Cedar Swamp cannot be found to be its critical habitat. *See* n. 3 above. While the United States falls back on evidence that the Eastern Bluebird is endangered, the Court is not persuaded. The Eastern Bluebird is considered threatened only on a list approved by the Commonwealth of

Massachusetts. However, should it prove significant, the Court finds that the swampy area of the Great Cedar Swamp is a critical habitat of the Eastern Bluebird.

These findings as to endangered bird life are thus not sufficient to redeem the case for the United States were it not for the prohibition against erosion and other nonpoint sources of pollution found in the regulation. It is clear, and the Court so finds, that the drainage ditches erected, despite Cumberland's best efforts, are not so fixed in their banks as to prevent a significant amount of silty erosion from entering the waters discharged. At least as to Raven Brook there is photographic evidence unmistakably showing such erosion and turbidity in the water. The Court infers that the ditching, while it drains the area, makes the water velocity increase, an effect which, in turn, increases the water's erosive force. Accordingly, the Court finds that a greater degree of erosion is occuring now that these drainage ditches are in place and the streams have been straightened.

With respect to Bartlett Brook, the finding must be inferential because there is no photographic evidence of such erosion or turbidity. The Court, then, makes such findings based on the inferences it draws from testimony about the eroding banks and that the streams have been ditched at various times. The court reasons that erosion observed in the banks must shed silt somewhere and, if signs of bank erosion have increased, so too must have the silt shedding. Therefore, the Court concludes that the "headwaters" permit does not apply.

The "Unasserted Jurisdiction Permit"

[4] Much more serious is the sweeping nationwide permit granted by the Corps and codified at 33 C.F.R., § 330.3 (1985). In relevant part, § 330.3 reads:

> The following activities are permitted by a nationwide permit which was issued on July 19, 1977 and need not

> be further permitted. . . . Structures or works completed . . . in water bodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation.

Cumberland did nothing to interfere with navigation here. Moreover, the first time the Corps asserted jurisdiction over the Great Cedar Swamp was by Colonel Siple's letter of December 28, 1984 to Cumberland. Accordingly, if the "Unasserted Jurisdiction Permit" applies to the Great Cedar Swamp, the conduct of Cumberland will remain free of Corps regulation until December 28, 1984. Upon reflection, however, the Court concludes that the "Unasserted Jurisdiction Permit" has no applicability to the Great Cedar Swamp and Cumberland's activities became subject to the Corps regulation on July 1, 1977, the date when the phased-in definition of wetlands came be be applicable to Cumberland's property.

An understanding of § 330.3(b) requires a discussion of the enabling statutes upon which the Corps' regulations are based. The primary foundation of the Corps' authority is § 404 of the Clean Water Act, 33 U.S.C. § 1344. There is, however, another statute under which the corps operates, namely the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-418. The Corps has regulated traditionally navigable waters under this law since the turn of the century. The Rivers and Harbors Act originally was enacted to give the Corps power to regulate waters within and adjacent to the United States in order to control and facilitate navigation. That goal remains a principal reason for the Rivers and Harbors Act, but it is no longer the only one. The Rivers and Harbors Act is now used also as a means to regulate pollution in navigable waters. *See* 33 C.F.R. § 320.1 (1985). *See also Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

The principal provision under the Rivers and Harbors Act is § 10, 33 U.S.C. § 403. That section prohibits the creation of any potential obstruction to navigation in waters of the United States, without a permit from the Corps of Engineers. The principal difference between § 404 of the Clean Waters Act and § 10 of the Rivers and Harbors Act is that the Rivers and Harbors Act applies to work or structures in water that is actually navigable in the traditional legal sense. In contrast, the Clean Waters Act applies to any discharge or addition of polutants into a much broader category of waters, namely navigable and non-navigable "waters [including wetlands] of the United States." An explanation of these statutes and the differences between them is found in the Corps' regulations. *See* 33 C.F.R. §§ 320.1, 320.2. *Compare* 33 C.F.R. Part 322 *with* Part 323; and § 323.2(a) *with* §§ 323.3(b), 32.2(a) and Part 329. *See also Reid v. Marsh*, 20 Env't. Rep. Cases (BNA) 1337 (N.D. Ohio 1984).

General or nationwide permits are granted under the regulatory schemes of both statutes. A nationwide permit obviates the need for individual permits for activities within the defined category. *See* 33 C.F.R. § 330.1 (1985). Nationwide permits under both the Clean Waters Act and the Rivers and Harbors Act were created administratively by the Corps in a rulemaking in 1977. *See* the preamble discussion to 33 C.F.R. Parts 320-329 (1977), 42 *Fed.Reg.* 37122, 37126 col. 2 [general permits under § 404] (July 19, 1977). Subsequently, Congress ratified the Corps' authority to promulgate such permits under the Clean Water Act. § 404(e), 33 U.S.C. § 1344(e). As originally codified, the nationwide permits were contained in separate parts of the Corps regulations, Part 322 for the Rivers and Harbors Act permits, and Part 323 for the Clean Waters Act permits. *See* the 1977 regulations and preamble cited above.

In 1982, the Corps combined the nationwide permits into one portion of its regulations, new Part 330. Preamble discus-

sion, 47 *Fed.Reg.* 31794, 31798-31800 (July 22, 1982). This is the part where both Rivers and Harbors Act § 10 and Clean Waters Act § 404 nationwide permits are now codified.

In the recodification, the Corps stated that many of the nationwide permits were meant to satisfy the requirements of both the Rivers and Harbors Act and the Clean Waters Act, but that some of them may, by their terms, still only apply to one or the other law. 33 C.F.R. § 330.1 (1985). Courts have recognized a continuing difference between some § 10 and § 404 nationwide permits. *See Orleans Audubon Society v. Lee*, 742 F.2d 901, 905-06, 906 n. 9, 911-12 (5th Cir. 1984).

The "Unasserted Jurisdiction Permit" applies only to "structures or work completed . . . in waterbodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred . . ." 33 F.R. 330.3(b) (1985). The definitional section of part 330 provides that the definitions contained throughout the balance of the Corps rules apply. 33 C.F.R. § 330.2(a) (1985). "Structure" and "work" are defined in the Corps regulations. Both definitions are found in 33 C.F.R. § 322.2.[8]

The term "structure" includes any "pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction." Cumberland's activities do not fit within this definition.

Similarly, its activities are not "work" under § 330.3(b). "Work" is defined as "any dredging or disposal of dredged material, excavation, filing or other modification *of a navigable water of the United States*." § 322.2(c) (emphasis added). For

[8] Where these definitions are codified has relevance in and of itself. Part 322 is the section of the Corps' rules dedicated to regulation under § 10 of the Rivers and Harbors Act. Part 322 does not apply to the Clean Water Act and § 404. *See* 33 C.F.R. § 322.1 (1985).

an activity to be "work," it has to be in "navigable waters of the United States." Section 322.2(a) defines "navigable waters of the United States" as "those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or presently are used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. *See* 33 C.F.R. part 329 for a more complete definition of this term." In other words, activities are not "work" unless they occur in traditionally navigable Rivers and Harbors Act § 10 waters. As Cumberland itself points out in its trial brief at pages 6-8, Bartlett and Raven Brooks and the Great Cedar Swamp are not navigable in fact, and do not fall within the jurisdiction of the Rivers and Harbors Act.[9] The Unasserted Jurisdiction Permit does not apply to the area of the Great Cedar Swamp.

Injunctive Relief

[5, 6] The parties agree that the legal framework for determining whether a restorative injunction is appropriate is found in *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir.1976). *See United States v. Weisman*, 489 F.Supp. 1331, 1343 (M.D.Fla.1980: *United States v. Bradshaw*, 541 F.Supp. 880, 883 (D.Md.1981). Any such restorative mandatory injunction must meet three criteria. First it must confer maximum environmental benefits; second, it must be achievable as a practical matter; third, it must bear an equitable relationship to the degree and kind of wrong which it is intended to remedy.

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[9] Some degree of confusion has been caused by the fact that both the Rivers and Harbors Act and the Clean Waters Act employ the terms "navigable" and "waters of the United States." The Corps has tried to avoid this confusion in its rules by using the phrase "waters of the United States" to connote the more encompassing reach of the Clean Waters Act, and the phrase "navigable waters of the United States" to connote the lesser reach of the Rivers and Harbors Act. *Cf.* § 323.2(a) (waters under the Clean Waters Act) with §§ 323.2(b), 322.2(a), and Part 329 (waters under the Rivers and Harbors Act).

The United States has proposed a specific restorative plan with four major aspects. First, the United States proposes to restore the water level in the Great Cedar Swamp to that obtaining as of July 1, 1977. The United States proposes to restore the preexisting water level by filling certain ditches within the swamp excavated by Cumberland and, on the two major natural water courses of the area, erecting a series of check dams which would cause the water to flow around and over the earthen dam structure itself, resulting in the flooding of areas previously drained by Cumberland. This, when coupled with two water control structures which the Corps proposes be erected at the downstream terminus of each of Raven and Bartlett Brooks where they exit the restored area of the swamp, will result in raising the water level.

In addition, the Corps proposes that cornfields be destroyed within the site to be restored and that bulldozers create a series of hummocks and hollows which, in the Corps' view, will best replicate the natural surface topography of this particular type of swamp.

Third, the Corps proposes that the cornfields turned into hummocks and hollows be mulched with strips of surface vegetation including a variety of propagules — those portions of plant life such as seeds, roots and the like, from which full plants may thereafter be grown. The Corps proposes to plow narrow strips from the existing swamp area, cart them out to the hummock and hollow area, and mulch that area with them so as to spread natural vegetation over the destroyed cornfields in a great variety, consistent with the flora presently extant in the swamp.

Finally, the Corps proposes that Cumberland may protect those cornfields devoted to agricultural use prior to 1977 by an earthen dam and ditch along the border of the area to be restored.

The Court considers first whether this plan will confer maximum environmental benefits not only on the immediate area— the Great Cedar Swamp, including the restoration area itself—but on the immediately surrounding area, the general waters of the United States, and the environmental balance in southeastern Massachusetts. The United States bears the burden of demonstrating that its plan will confer the maximum environmental benefits.

A variety of considerations cut against the plan. First, the plan will result directly in the destruction of over an hundred acres of productive farmland, presently devoted to the growing of corn—a use which, had it not occurred in a wetland, would not only be sanctioned by the policies of both the United States and the Commonwealth of Massachusetts, but encouraged by those sovereigns.

Second, the proposed plan creates an increased risk of damage to certain cranberry bogs immediately south of the site proposed to be restored. There exists the risk that those bogs, which were extant and operating before the Great Cedar Swamp ever came under the jurisdiction of the Corps, will be damaged by an increase in the ground water level and that the ability of the bog owners to drain the bogs rapidly, an important aspect of cranberry culture, will be inhibited. On this record, the Court cannot say that such interference with these bogs is a likelihood or an inevitability, but it certainly is a possibility on this record, one which must be recognized.

Third, subsequent to July 1, 1977, five homes have been built hard by the eastern border of the swamp area to be restored, and a sixth has had a septic system installed. These five new homes, erected along Fuller Street during 1983, and 1984, achieve their septic drainage through a series of septic tanks which comply in all respects with Title V of the Massachusetts Sanitary Code. Indeed, the four new houses erected

to the west of Fuller Street[10] all have cellars which extend approximately seven feet below the ground level. The houses themselves are all on or above the 30 foot contour line on maps having reference to the data base used for all calculations herein and in the final judgment. Even so, it is a distinct possibility that raising the level of the water in the Great Cedar Swamp in the manner in which the Corps proposes could have the effect of flooding the basements of these houses and in effect destroying their septic systems, diminishing the value of their land in a town which has no town sewage in this particular area.

Then, too, it is clear that if the swamp area is restored to the level existing in 1977, a great deal more surface water will be exposed to the air. That, of course, is the goal of the restoration. Likewise, such restoration would cause the streams and the surface water to be far more stagnant than the draining, ditching, and filling operations of Cumberland have caused it to be. It is undisputed that such stagnant, swampy water will, among other insect life, be an haven for the breeding of mosquitoes. The Court takes judicial notice, Fed.R.Evid. 201(b), that southeastern Massachusetts has in the past five years been the source of a few cases of Eastern Equine Encephalitis, a disease borne by mosquitoes which is sometimes fatal.

Weighing against these concerns, there are a variety of considerations that favor restoration of the swamp. Restoration of the site will play a role in flood control. While this particular site is not a water recharge area to any significant degree, since the ground and surface water sits on a rather hard and impervious clay substrate, restoration of the area will slow down the water flow, serve to prevent flood surges, and assist in the natural regulation of the water flow from the headwaters

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[10] The Court makes no finding with respect to a certain log cabin erected to the east of Fuller Street.

of the Raven and Bartlett Brooks down through the Winnetuxet and Taunton Rivers. The area, therefore, like most wetlands, functions as a flood storage area for this part of Massachusetts.

Moreover, the restoration of the Great Cedar Swamp can be expected to significantly improve the functioning of that particular wetland as a biological filter, one which will serve naturally to improve the quality of the water downstream. This is accomplished by slowing up the water, causing it to meander through the swamp and be naturally filtered through all the natural organic material in the swamp.

Finally, restoration of the area in the manner proposed by the Corps will have a direct improvement on the animal habitat. The Great Cedar Swamp is one of the largest remaining wetlands in Massachusetts. It is bordered by the Little Cedar Swamp to the east. The whole idea of strip mulching a variety of flora around and over the destroyed cornfields is to maximize the potential for restoring the area as a nesting and breeding place for all those natural species, both flora and fauna, which during former times existed in the swamp. In order to have a full array of animal and bird life in a swampy area of this sort, a swamp of a certain size must be maintained. This is so because the animal and bird life in a swamp of this sort need a certain territorial range. The failure to restore the Great Cedar Swamp to its 1977 boundaries would not simply restrict plant and animal life to the portion of the swamp as yet undisturbed, but it could well serve to cause particular species to leave the area altogether—an irreparable loss. The controlling law tips the balance in this case in favor of a restorative injunction. Certainly the controlling law favors the restoration of wetlands which have been adversely affected without a permit and contrary to law. Indeed, unless the balance cuts significantly against a restoration of the environment to the status that it enjoyed when the legislation with respect to this land took effect in 1977, restoration ought be ordered. "The intricate

web of interdependence which characterizes our environment requires that we look beyond the present and immediate in assessing the value of any particular element of the environment or of gauging the harm that will accrue from its destruction." *United States v. Weisman*, 489 F.Supp. 1331, 1346 (M.D.Fla. 1980) (Scott, J.). In *Weisman*, Judge Scott thoughtfully and precisely articulates the legislative intent that the nation's wetlands be preserved. Therefore, despite the recognized possibility of adverse consequences to immediate abutters, a restoration of the site to the status it enjoyed in 1977 is in the public and the national interest and consistent with the controlling law and, therefore, as this Court interprets the controlling standard, maximizes environmental benefits.

The second consideration concerns the practicability of achieving a restoration of the site to its condition as of 1977. It is appropriate and reasonable to gauge the 1977 level of the swamp from the growth of the tussock sedge along the borders of the natural water courses within the swamp. The Court finds that level to be between 25 and 26 feet above the standard data base. The Court recognizes that, with respect to the bulldozing of hummocks and hollows and the strip mulching, the proposed restoration project is somewhat experimental and untested. It may be, as counsel has noted, that the Court will become "the architect of a great mud pond." On the totality of the record before it, however, the Court finds this unlikely. The proposal made by the Corps is both technically competent and innovative and, in furthering the public good, one worthy of attempting. With some modification, the Court finds the proposal to be practicable.

Third, the Court must consider whether the proposed project bears an equitable relationship to the degree and kind of wrong which it is intended to remedy. Since portions of the wetland were, since 1977, adversely and illegally affected by the draining and filling operations, it is not inequitable to destroy the

cornfields planted in those portions. Those who built their houses hard by the Great Cedar Swamp are in a somewhat different position as they did so in complete good faith, without any knowledge or appreciation of the possibility that Cumberland was illegally farming its own property. Still, the fact is that the Great Cedar Swamp came within the Corps' jurisdiction on July 1, 1977 and abuttors who built their houses thereafter are thus in a position analogous to those who have built in violation of zoning laws of which they knew nothing. They bear the risk that the controlling law will be uniformly enforced, *see* e.g., *Cullen v. Building Inspector of North Attleborough*, 353 Mass. 671, 678-679, 234 N.E.2d 727 (1968) (structures offensive to zoning by-law ordered dismantled despite economic waste argument); *accord Carpenter v. Zoning Board of Appeals of Framingham*, 352 Mass. 54, 223 N.E.2d 679 (1967); *Bridgewater v. Chuckran*, 351 Mass. 20, 217 N.E.2d 726 (1966), and it is thus not inequitable to enforce the law here for the general public good even though such enforcement carries with it some attendant risks for these abuttors. The owners of the cranberry bogs to the south are in still a different position. Like the newly abutting homeowners, they are completely without fault. Moreover, their cranberry farming antedated any government regulation in this area whatsoever. For the restoration under the Corps' auspices to adversely affect their interests would appear to violate the agricultural exemption they enjoy under 33 U.S.C. § 1344(f)(1). Accordingly, the Court concludes that, as to them, the restoration proposed by the Corps is so sweeping as to be inequitable. Thus, no check dam shall be constructed closer than 1,000 feet from the boundary of any such cranberry bog. Pursuant to the same reasoning, since there were cornfields extant both east and west of Raven Brook prior to 1977, but one check dam shall be erected along that portion of Raven Brook bordered on both sides by these cornfields.

The mandatory restorative injunction which forms part of the final judgment herein is crafted in such a way as to restore the Great Cedar Swamp to its condition as of July 1, 1977, sensitive to the concerns just discussed.

Penalty

[7] Pursuant to the Clean Water Act, 33 U.S.C. § 1319, it is open to the United States to seek a civil penalty of up to $10,000 per day for each day of violation of that Act. A day of violation constitutes not only a day in which Cumberland was actually using a bulldozer or backhoe in the wetland area, but also every day Cumberland allowed illegal fill material to remain therein. *United States v. Tull*, 615 F.Supp. 610, 626 (1983), *aff'd* 764 F.2d 182 (4th Cir.1983). *See also Chesapeake Bay Foundation, Incorporated v. Gwaltney*, 791 F.2d 304, 24 ERC 1417-1427 (4th Cir. 1986).

Since 1972 Cumberland has followed an intentional policy of draining, ditching, filling the Great Cedar Swamp and turning it to productive agricultural use. That policy has been implemented at a rate consistent with Cumberland's economic needs in light of the equipment and manpower available to actually seed and plant the areas taken from the wetland.

When Cumberland first became aware that local, state, and national authorities questioned its right to continue its draining and filling operations, it did two things. First, it resorted to active and aggressive lawyering, the exercise of its legal rights to determine its legal position. Throughout, insofar as this Court can see, the issues that Cumberland has placed before the state and federal courts have been, in the main, issues worthy of careful consideration and appropriate for full litigation, and no sanction will be visited upon it for this conduct. At the same time, it is clear that Cumberland, even after the intitial requests and then orders that it stop, continued with its filling, ditching, and grading operations. It continued, more sporadically, somewhat surreptitiously, but it did intentionally

continue to fill, drain, and ditch the premises on the theory that the regulatory authorities and the courts would not be likely to order destruction of fields already plowed and planted but would rather simply order an halt to further activities. For this conduct, too—at least insofar as it took place prior to December 28, 1984—Cumberland will not be punished, though the Court finds Cumberland's conduct and its insensitive approach to responsible environmental concerns reprehensible as a matter of corporate citizenship. The Corps' own opaque regulation, 33 CFR 330.3, so vitiates any claim of legal culpability on the part of Cumberland prior to December 28, 1984 that this Court, as matter of discretion, refrains from imposing any penalty for actions prior to that date.

The United States argues that there is no credible evidence that Cumberland actually relied on the Unasserted Jurisdiction Permit. This is so, but it is irrelevant. Insofar as the Clean Water Act provides for penal sanctions, it is to be strictly construed. *See United States v. Anzalone*, 766 F.2d 676, 680 (1st Cir.1985); *United States v. Medina*, 797 F.2d 1109, 1114 (1st Cir.1986). A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); *Winters v. New York*, 333 U.S. 507, 515-516, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). This is no less true of a federal regulation. The Unasserted Jurisdiction Permit regulation, 333 CFR 330.3, fails this test since persons of common intelligence would not suspect that it applies solely to exempt certain conduct from the reach of the Rivers and Harbors Act, § 10, and has no applicability to the permit granting procedure under the Clean Water Act. To paraphrase a distinguished

Massachusetts jurist, "The vice of [this regulation prior to the unequivocal assertion of Corps jurisdiction] lies in its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is prima facie lawful into that which is [penalized]." *Commonwealth v. Carpenter*, 325 Mass. 519, 521, 91 N.E.2d 666 (1950) (Wilkins, J.). Indeed, the draftsmanship of the Unasserted Jurisdiction Permit, 33 CFR 330.3, is a reproach to the Corps. Without the most extensive and careful analysis of the background of the regulatory scheme, no reasonable person in Cumberland's position would conclude that he did not enjoy the protection of the Unasserted Jurisdiction Permit, at least until December 28, 1984.[11] In these circumstances no penalty ought be visited on Cumberland for its conduct prior to its receipt of the letter of December 28, 1984.

After December 28, 1984, or at least once the Corps' letter of that date was received by Cumberland on January 2, 1985, however, it could hardly misunderstand that the Corps was exercising jurisdiction over the Great Cedar Swamp and the national permit set out in 33 CFR 330.3 had no further arguable relevance. Cumberland refused to comply with the immediate remedial measures demanded, and sought the judgment of "some higher authority." Whatever it meant by that, to the extent that Cumberland, in effect, said, "Sue, me," this Court will impose no punishment. That is what the courts are for.[12]

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[11] It will be remembered that, in seeking to have Cumberland's declaratory judgment action dismissed, the Corps itself represented to this Court on September 9, 1983 that it had *not* determined whether to exercise jurisdiction over the Great Cedar Swamp.

[12] The United States seems to be arguing that the gravity of Cumberland's offense under the Clean Waters Act is deepened by its refusal to submit immediately to the Corps' demands that it flood certain of its fields and dam numerous drainage ditches that it had constructed at its own cost. To accept

[8] Whatever Cumberland's right to seek legal redress, however, Cumberland well knew it assumed the full risk of condign punishment for its further destruction of the Great Cedar Swamp. Nevertheless, even with this full knowledge, on or about March 10, 1985, and in the days preceding, Cumberland extended the area of soil disturbance further into the swamp by burning brush and by moving and grading and filling the top soil in defiance of the cease and desist order.[13]

Further, on April 3, 1985, Cumberland was operating a backhoe within the swamp area along the westerly border of the site and was removing material from a ditch it had earlier constructed, piling that material on wetland vegetation and destroying certain of that wetland vegetation.

Likewise, during the spring of 1985, in defiance of the cease and desist orders, Cumberland ran a ditch from the center of its property to the Bartlett Brook. This ditching, in addition to the destruction of wetland vegetation, caused further erosion of soil in that area.

In May, 1985, Cumberland took the next step of converting to productive farmland the land it had taken from the Swamp

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this argument would result in embracing a princple entirely foreign to our tri-partite democratic system of checks and balances and would punish Cumberland for resorting to the courts. It is one thing to punish for affirmative conduct knowingly undertaken in defiance of lawful cease and desist orders. This Court will bring the full weight of the law to bear to punish such misconduct. *See infra* at 46-47. It is quite another to punish someone for inaction when he chooses to resort to the courts to adjudicate his rights rather than perform some affirmative action required by his government, which action will destory his property and cause him economic harm. In short, someone who refuses to jump through the government's hoop and instead says, 'take me to court,' should not, and in this Court will not, be punished for that conduct.

[13] Cumberland advances the argument that the destruction of the natural site—the Court uses the word "destruction" advisedly—must have taken place the preceding autumn. That it preposterous. The photographic evidence, especially Exhibit 26, speaks for itself. The fresh vehicle tracks and debris are so obvious as to compel the conclusion that major soil disturbance was taking place in March, 1985 in defiance of the cease and desist order.

in March. Cumberland stored manure in that area prepatory to spreading it on the plowed topsoil.

During November and December, 1985, in defiance of the Corps' cease and desist orders, Cumberland extended a field it had earlier cleared near the southerly border of the site. In extending the border of that field, Cumberland piled fill material within an area of the swamp and, indeed, pushed stumps and top soil close by the edge of Raven Brook.

The work accomplished subsequent to the receipt on January 2, 1985, of the letter of December 28, 1984, consumed, at a minimum, 20 man days, all of which involved the use of heavy equipment on fragile wetland vegetation. Each of these incursions was made well knowing that, at least as of December 28, 1984, the United States asserted jurisdiction over the site, and what's more, had ordered that such disturbance of the wetland area cease. Each and every one of these incursions was made in intentional violation of the orders of the Corps. The penalty imposed in the final judgment entered herein is designed to punish Cumberland and deter others from similar misconduct within the nation's environmentally precious wetlands.

Appendix B.

UNITED STATES of America,
Plaintiff, Appellee,

v.

CUMBERLAND FARMS OF CONNECTICUT, INC.,
Defendant, Appellant.

No. 86-1983.

United States Court of Appeals,
First Circuit.

Heard April 9, 1987.

Decided Aug. 18, 1987.

As Amended Aug. 20, 1987.

United States brought action against farming corporation, charging violations of the Clean Water Act. After issuing injunction, 644 F.Supp. 319, the United States District Court, William G. Young, J., 647 F.Supp. 1166, held that farming corporation was not exempt from Army Corps of Engineers permit requirements, and that corporation was liable for civil penalties for action taken in direct affiance to cease and desist order. Corporation appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that: (1) farming corporation did not qualify for "headwaters" nationwide permit, so that its drainage of freshwater wetland without individualized permit violated the Clean Water Act; (2) any ambiguity in nationwide "unasserted jurisdiction" permit issued by the Army Corps of Engineers, as to whether permit applied to drainage activities regulated under the Clean Water Act, did not excuse farming

corporations from its equitable duty to reverse harmful affects of drainage activity; and (3) restorative injunction, requiring corporation to restore wetland to its original condition, was not abuse of discretion.

Affirmed.

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Allen van Gestel with whom Nancer Ballard, William J. Duensing and Goodwin, Procter & Hoar, Boston, Mass., were on brief for defendant, appellant.

Edward J. Shawaker with whom F. Henry M. Habicht II, Asst. Atty. Gen., Washington, D.C., Robert S. Mueller III, U.S. Atty., Richard F. Welch III, Asst. U.S. Atty., Boston Mass., and David C. Shilton, Washington, D.C., were on brief for plaintiff, appellee.

Douglas B. MacDonald, Ralph A. Child, David P. Novello and Palmer & Dodge, Boston, Mass., on brief for Sierra Club, amicus curiae.

Before CAMPBELL, Chief Judge, TORRUELLA, Circuit Judge, and MALETZ,* Senior Judge.

LEVIN H. CAMPBELL, Chief Judge.

This is an appeal by Cumberland Farms of Connecticut, Inc. ("Cumberland") from a judgment of the United States District Court for the District of Massachusetts.[1] The district court ruled that from 1977 to 1985 Cumberland had violated sections 301 and 502 of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1311, 1362 (1982), by dredging and filling a freshwater wetland without the re-

* Of the United States Court of International Trade, sitting by designation.

[1] The district court's opinion is printed at 647 F.Supp. 1166 (D. Mass. 1986).

quired permit from the Army Corps of Engineers ("Corps"). Clean Water Act, section 404, 33 U.S.C. § 1344 (1982). The court ordered injunctive relief directing Cumberland to restore the wetland to approximately its 1977 condition. The court also imposed a civil fine of $540,000, of which $390,000 was to be remitted to Cumberland if it satisfactorily restored the wetland as ordered in the injunction. Cumberland raises numerous issues on appeal.

I. BACKGROUND

The area in contention consists of about 2,000 acres of the Great Cedar Swamp located in southeastern Massachusetts. Prior to Cumberland's activities, the Great Cedar Swamp was a forested freshwater swamp. It was then one of the largest freshwater wetlands in Massachusetts. Freshwater wetlands are ecologically valuable for various reasons. They act as a natural flood control mechanism by slowing and storing storm water runoff. They help supply fresh water to recharge groundwater supplies. They serve as biological filters by purifying water as it flows through the wetlands. They provide seasonal and year-round habitat for both terrestrial and aquatic wildlife. *See* 33 C.F.R. § 320.4(b) (1986).

In 1972, V.S. Hasiotis, Inc., purchased the 2,000-acre wetland, leasing it to Cumberland Farms of Connecticut, Inc. (a related corporation owned by essentially the same shareholders as Hasiotis, Inc.). Beginning in 1972 and continuing through 1985, Cumberland began converting the swamp into farmland using dredge and fill techniques. Cumberland removed the standing timber, bulldozed the stumps and roots and levelled the soil in preparation for planting. To lower the water table so as to make the wet soil arable, Cumberland dug a network of drainage ditches and channelized two streams (the Raven Brook located on the eastern side of the swamp, and the Bartlett Brook to the west).

In recent times the Army Corps of Engineers has been regulating the dredging and filling of freshwater wetlands, relying for its authority on sections 301 and 502 of the Clean Water Act, 33 U.S.C. §§ 1311 & 1362. These provisions prohibit the discharge of dredged or fill material into "navigable waters" unless authorized by a permit issued by the Corps pursuant to section 404, 33 U.S.C. § 1344. When these provisions were enacted in 1972, the Corps at first construed the term "navigable waters," 33 U.S.C. § 1362(12), literally. Thus from 1972 until 1975, a Corps permit was required under section 404 of the Clean Water Act only if dredge and fill operations took place in waters that were actually navigable.

In 1975, the Corps revised it regulations so that the term "navigable waters" came to include, *inter alia,* freshwater wetlands that were periodically inundated and which supported vegetation that requires saturated soil conditions. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 457, 88 L.Ed.2d 419 (1985); 33 C.F.R. § 209.120(d)(2)(*h*) (1976). In 1977, the Corps further extended this jurisdiction over wetlands by eliminating the requirement that the wetland be periodically inundated, requiring only that it be inundated or saturated by surface or groundwater at a sufficient frequency to support vegetation adapted for life in saturated soils. *Id.* at 458; 33 C.F.R. § 323.2(c) (1978). In *Riverside Bayview Homes,* the Supreme Court upheld the Corps' expanded view of its regulatory authority over freshwater wetlands under the Clean Water Act. *Id.* at 465. In conjunction with its program of regulating dredge and fill activities, the Corps established a number of so-called "nationwide permits." These allow certain categories of activities to be carried on without first obtaining an individual permit. At issue in this case is whether Cumberland's dredge and fill activities were validated by one or another of two nationwide permits.

The practicial effect of the Corps' expanding jurisdiction under the Clean Water Act was that, beginning in July 1977,

the wetlands in question came under the Corps' regulatory power. Thereafter, Cumberland's dredge and fill activities required an individual permit from the Corps pursuant to section 404, 33 U.S.C. § 1344, unless, as discussed *infra*, Cumberland qualified under a statutory exception to the permit requirement or for a general nationwide permit. Cumberland did not, however, apply for an individual permit in 1977 or thereafter, but continued to dredge and fill the Great Cedar Swamp. The district court found that from 1978 to 1985 Cumberland converted 674.4 acres of wetland to farmland through the use of dredge and fill. 647 F.Supp. at 1171.

In April 1983, a private individual first alerted the Corps to Cumberland's activities. The Corps then sent a letter to John Peck, Vice President of Operations for Cumberland, noting the discharges of dredge and fill material were apparently being made into waters under the Corps' jurisdiction without the required permit. The letter stated that no additional work should be performed in the area subject to the Corps' jurisdiction unless and until Cumberland obtained a permit. The letter asked for some additional information and recommended that exposed stream banks along the Bartlett and Raven Brooks be stabilized. In addition, the Corps set out eight interim protective measures that Cumberland should institute in order to restore the water table to its 1977 level, including filling various drainage ditches that Cumberland had installed.

In May 1983, Cumberland responded by asserting that its activities fell within the statutory exemption for agricultural work, 33 U.S.C. § 1344(f)(1), and that in Cumberland's view no permit was needed. In June 1983, prior to any further Corps activity, Cumberland instituted an action against the Corps in federal district court seeking a declaratory judgment that its activities were permitted by the statutory agricultural exemption. Cumberland argued that the Corps' letter had been a final determination by the agency of its jurisdiction, and that this

determination presented a judicially reviewable issue. Because the Corps allegedly had no power to regulate Cumberland's activities in the Great Cedar Swamp, Cumberland argued that it should not be required to apply for a permit or otherwise go through the administrative process. The district court dismissed Cumberland's action, agreeing with the Corps that, as of yet, the Corps had only made an initial determination of jurisdiction and that this initial determination did not permit judicial review. The court held that to allow the declaratory judgment action to proceed would improperly and prematurely interrupt the Corps' administrative process. The court made it clear that its dismissal of the action would not preclude Cumberland from raising the jurisdictional issue after the Corps had completed its administrative process.

In December 1984, the Corps unequivocally asserted jurisdiction in a letter to Cumberland. The Corps pointed out alleged violations of the Clean Water Act, ordered that Cumberland cease its illegal activity and demanded that eight interim protective measures be undertaken. These interim protective measures were designed to restore the area to its 1977 freshwater wetland condition. Cumberland objected to the interim protective measures because they would have inundated Cumberland's farm fields. Cumberland refused to implement the protective measures unless and until "some higher authority" determined that to be an appropriate result. For the first time, Cumberland formally applied for an individual permit, but the Corps took the position that under its regulations it could not consider issuance of a retroactive permit until the area had been restored to its 1977 condition under the mandated interim protective measures. 33 C.F.R. § 326.3(c) (1986). The Corps then brought this enforcement action.

The district court held a bifurcated trial with a liability phase and a remedies phase. As to liability, the court found that Cumberland had violated the Clean Water Act by discharging

into waters of the United States without a Corps permit. 647 F.Supp. at 1174-75. The court held that Cumberland's activities did not fall within the statutory exemption for agricultural activities, ruling that the exemption applies only to prior established and continuing farming, *id.* at 1175, whereas Cumberland's activities constituted a new conversion of wetland to agriculture. Cumberland does not appeal from this ruling.

The district court also rejected Cumberland's claim that it qualified for either the "headwaters" nationwide permit, 647 F.Supp., at 1177-78, or the "unasserted jurisdiction" nationwide permit, *id.* at 1178-80. Cumberland appeals from these rulings, arguing the both nationwide permits applied to its activities, relieving it from any need to obtain an individual permit.

After finding Cumberland liable for violating the Clean Water Act, the court held a second trial, this time to consider a monetary penalty and an injunction ordering Cumberland to restore the property to its former state.

The court concluded that it would not assess a fine for the period from 1977 to December 1984. It found the language in the regulation relating to the "unasserted jurisdiction" nationwide permit so opaque as to vitiate any legal culpability on the part of Cumberland during these years. 647 F.Supp. at 1184. *After* December 1984 (when the Corps unambiguously asserted jurisdiction), the court believed that Cumberland could not have misunderstood that the nationwide "unasserted jurisdiction" permit did not cover its activities. The court found that from December 1984 through March 1985, despite the clearly asserted jurisdiction by the Corps, Cumberland continued its further destruction of the Great Cedar Swamp, in direct violation of the Corps' cease and desist order. The court found that this continued intentional violation of the Clean Water Act warranted a civil monetary penalty. 647 F.Supp. at 1185.

The court also considered the Corps' request for a injunction ordering that the wetland be restored to approximately its 1977 condition. The Corps' proposed a plan called for a process of restoration with four major components. The water level of the Great Cedar Swamp was to be restored to it 1977 level by filling in certain ditches, and by erecting a series of check dams. The plan proposed that bulldozers be used to create a series of hummocks and hollows, so as to best replicate the natural surface topography of a swamp. The plan proposed that narrow strips of vegetation from the nearby existing swamp area be plowed up and moved to the restoration area. These strips of surface vegetation would be spread over the restoration area so as to provide a plant and seed source to regenerate a great variety of swamp species. The plan also proposed that an earthen dam and ditch be constructed along the edge of the restoration area to protect Cumberland's cornfields that were established prior to 1977.

The court generally accepted the Corps' restoration plan, finding that it would confer maximum environmental benefits, 647 F.Supp. at 1181-82, that the plan was practical and would achieve the desired result of restoring the wetland to approximately its 1977 condition, *id.* at 1182-83, and that the restoration bore an equitable relationship to the degree and kind of wrong which it was intended to remedy, *id.* at 1183. The court modified the Corps' proposed restorative plan to the extent of altering the location of the check dams in order to protect nearby cranberry bogs and to better protect Cumberland's cornfields that were to remain. On appeal Cumberland challenges the restoration order, arguing that it is impractical and speculative. Cumberland further argues that the district court should not have ordered restoration of the swamp but rather should have remanded to the Corps so that Cumberland could apply for an after-the-fact individual permit.

II. NATIONWIDE PERMITS

Cumberland contends that the district court erred in deciding that Cumberland's activities in the Great Cedar Swamp were not authorized under either of two nationwide permits.[2]

A. *The Headwaters Nationwide Permit*

Cumberland argues that it qualified under the "headwaters" nationwide permit. That permit, codified in 1977 at 33 C.F.R. Part 323, provides,[3]

> (a) Discharges of dredged or fill material into the following waters of the United States are hereby permitted for purposes of Section 404, provided the conditions in paragraph (b) below are met:
> (1) Non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters;
> . . . .
> (b) For the purposes of Section 404, the following conditions must be satisfied for any discharge of dredged or fill material in waters described in paragraph (a) above;
> . . . .
> (3) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution. . . .

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[2] In his answers to the Corps' interrogatories, Mr. Peck, on behalf of Cumberland, stated that Cumberland was not contending that its activities qualified for any nationwide permit. During trial when Cumberland began trying to rely on these nationwide permits, the Corps did not hold Cumberland to its admission in the interrogatory, and so the district court addressed the question of applicability of the nationwide permits. *See* 647 F.Supp. at 1177 n. 7.

[3] This nationwide permit was subsequently amended and recodified. *See* 33 C.F.R. § 330.5, as modified at 49 Fed.Reg. 39,478, 39,484 (Oct. 5, 1984). The amendments to the permit are not at issue in this case.

The term "headwaters is defined as

> the point on a non-tidal stream above which the average annual flow is less that 5 cubic feet per second. The District Engineer may estimate this point from available data using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

33 C.F.R. § 323.2(i) (1977). Thus, so long as specified conditions are met, the headwaters permit authorizes discharges in areas within and adjacent to streams which flow at a rate of less than five cubic feet per second.

In determining that the headwaters permit did not apply to Cumberland's activities, the court below found that the rate of flow of the two streams on Cumberland's property was *greater than* five cubic feet per second. In support of this finding are maps showing that, as early as 1974 or 1975, two streams traversed the length of the property, and evidence that, at the point where each stream left Cumberland's property, the rate of flow exceeded five cubic feet per second (5.6 cubic feet per second on the Raven Brook, and 5.4 cubic feet per second on the Bartlett Brook). Cumberland asserts that at some point in its property the rate of flow for each stream drops below the five cubic feet per second threshold. However, the district court held that Cumberland never met its burden of proof on this point.

Cumberland contends that in cross-examining the Corps' expert, Mr. Manley it mathematically established how much of its property should be covered by the headwaters permit. But the district court was not persuaded that, without further measurements or expert testimony, this evidence enabled it to pinpoint the location where each stream's flow rate dropped

below five cubic feet per second. Manley's own testimony suggested that simple mathematics alone was insufficient to fix that point. He testified that to do so would require study of the topography maps to determine drainage patterns.

[1] Since Cumberland is seeking to qualify under this exception to the individual permit requirement, it had the burden of persuading the court of the applicability of the headwaters permit. *See Riverside Irrigation District v. Andrews,* 758 F.2d 508, 514 (10th Cir. 1985) (one seeking to qualify under nationwide permit must show the conditions for permit exist). Cumberland did not present any expert testimony to assist the court in applying the mathematical formula, to locate on a map the point where each stream fell below the threshold flow level, and to delineate what wetlands adjacent to that point were covered by the headwaters permit. Cumberland had no right to expect that the unassisted court would or could complete the mathematics, study the drainage patterns, and then apply the formula to a map so as to establish the location of the headwaters and the appropriate adjacent wetlands.

[2] The court, moreover, provided an alternative ground for its determination that the headwaters permit did not apply. It found that Cumberland had not complied with the condition of the headwaters permit that the "fill created by the discharge be properly maintained to *prevent erosion* and other non-point sources of pollution." 33 C.F.R. § 323.4-2(b)(3) (1977) (emphasis added).

> It is clear, and the Court so finds, that the drainage ditches erected, despite Cumberland's best efforts, are not so fixed in their banks as to prevent a significant amount of silty erosion from entering the waters discharged.

647 F.Supp. at 1178. Cumberland urges us to construe the Corps' regulation to include only erosion shown to have an

adverse or harmful effect on downstream waters. However, when the Corps promulgated the nationwide permit, it said nothing about requiring a showing of a specific adverse or harmful effect from the erosion. *See* 42 Fed.Reg. 37,131, col. 2 (July 19, 1977). Here the court found a "significant" amount of erosion, a finding that does not allow us to treat the erosion as *de minimis*.[4] Under Cumberland's view, it should be free to cause erosion so long as the Corps is unable to trace a downstream effect back to Cumberland as the single property of origin. But this view ignores the possible cumulative harmful effects of erosion from various different properties and sources. Even were erosion from a particular project to be relatively "minor," its combined effect might be deleterious. Moreover, it might be hard to establish its overall contribution to the total harm. Since the headwaters permit is, in effect, an exception to the statutory requirement of an individual permit, we believe the Corps' own, more narrow, interpretation of its regulatory exception should prevail. *See United States v. Huebner*, 752 F.2d 1235, 1241 (7th Cir.) (upholding narrow interpretation of statutory agricultural exemption from permit requirement), *cert. denied*, U.S. , 106 S.Ct. 62, 88 L.Ed.2d 50 (1985).

B. *The Unasserted Jurisdiction Permit*

[3] Cumberland contends that another nationwide permit — the "unasserted jurisdiction" permit — validated its activities. The district court held that the unasserted jurisdiction permit does not apply to dredge and fill activities regulated under the Clean Water Act, but rather applies only to activities regulated

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[4] The district court found that a "significant" amount of erosion — not merely some "minor" amount as Cumberland claims — was occurring from Cumberland's activities. There was ample evidence, in the form of testimony and pictures, to support the court's finding of "significant" erosion.

under the River and Harbor Act. 647 F.Supp. at 1180. Since Cumberland was prosecuted for violating the Clean Water Act, the court found Cumberland's reliance upon the unasserted jurisdiction permit unavailing.

While finding this permit did not apply, the court was troubled that the Corps' 1982 regulations pertaining to the permit were ambiguous — so much so, indeed, that an ordinary person might then have believed, in the court's view, that this nationwide permit *did* validate dredge and fill under the Clean Water Act. Because of the 1982 ambiguity, the district court declined to impose any civil fine for the entire period 1977 through 1984. 647 F.Supp. at 1184. The district court relied on case law invalidating penal sanctions under excessively vague enactments. *Id.* Cumberland argues on appeal that the vagueness of the 1983 regulation should, as well, relieve it from any equitable duty to restore the 2,000-acre property to its 1977 state. To understand this argument — which we find meritless it is necessary to examine the relevant statutes and regulations in some detail.

Under section 10 of the River and Harbor Act, 33 U.S.C. § 403, the Corps has traditionally protected navigation by regulating the building of structures (piers, docks, etc.) within navigable waters as well as dredge and fill activities in such waters. Any proposed project which would interfere with navigation has required a Corps River and Harbor Act permit. *See* 33 U.S.C. § 403 (creation of any obstruction in navigable waters unlawful absent authorization by Corps).

Starting in 1968, the Corps began to use its authority under the River and Harbor Act to regulate activities within navigable waters which, while not necessarily obstructing navigation, would cause pollution. *See generally Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). Yet while the Corps expanded its use of the River and Harbor Act so as to cover activities

causing pollution (as well as those obstructing navigation), it did not (as with the Clean Water Act) claim a right to regulate in waters that were not tidal or navigable in fact. *See* 33 C.F.R. § 322.2(a). Thus today, the Corps administers a dual permit system under two different statutes — the River and Harbor Act and the Clean Water Act — to regulate dredge and fill activities that cause pollution in navigable waters; but in so doing it construes the term "navigable waters" differently. Under section 10 of the River and Harbor Act it construes the term to embrace dredge and fill activities within actually navigable waters, while under section 404 of the Clean Water Act it construes the term so as to regulate dredge and fill in waters that are not only navigable in fact, but may include freshwater wetlands.

In 1977, the Corps' regulations under the River and Harbor Act exempted from the individual permit requirement, "Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer *has not asserted jurisdiction* provided there is no interference with navigation." 33 C.F.R. § 322.4(g) (1977) (emphasis added). It is this so-called "unasserted jurisdiction" nationwide permit which Cumberland argues obviated any need for it to have obtained in 1977 and thereafter an individual permit under the Clean Water Act.

Cumberland's argument rests on a poorly worded recodification of the unasserted jurisdiction nationwide permit that the Corps issued *in 1982*. This version could be read to imply that the nationwide permit applied to activities regulated under both section 10 of the River and Harbor Act *and* under section 404 of the Clean Water Act. The ambiguous version was in effect only briefly as respects Cumberland, and there is no evidence that anyone from Cumberland ever saw or relied on it, but Cumberland argues that the standard is how it would appear to "men of common intelligence" who had read it. 647 F.Supp. at 1184 (citng *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The most obvious weakness in Cumberland's argument is that when, in 1977, its dredge and fill activities came under the jurisdiction of the Clean Water Act, the Corps' regulations were entirely clear that the unasserted jurisdiction permit applied only to activities regulated under section 10 of the River and Harbor Act. Regulations governing the Clean Water Act were codified at 33 C.F.R. Part 323. In contrast, the regulations governing the Corps permit program under section 10 of the River and Harbor Act were codified at 33 C.F.R. Part 322. In an introductory section, the Corps explained that the regulations under part 322 applied only to section 10 of the River and Harbor Act, noting, however, that certain activities might be governed by more than one statutory or regulatory scheme.

> This regulation prescribes, in addition to the general policies of 33 C.F.R. 320.4 and procedures of 33 C.F.R. Part 325 those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize structures or work in or affecting navigable waters of the United States pursuant to section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) (hereinafter referred to as section 10). *See* 33 C.F.R. 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the Department of the Army. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344; *see* 33 C.F.R. Part 323) and . . . [listing other statutory Corps authorities not relevant to this issue]. A Department of

> the Army permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

33 C.F.R. § 322.1 (1977).

The Corps thus made it clear in 1977 and thereafter (until 1982), that the regulations under part 322 applied only to activities regulated under section 10 of the River and Harbor Act, and that applicants should refer to other sections of the regulations, *i.e.*, part 323 which governs the Clean Water Act, to determine whether their proposed activities were regulated under other statutory authorities. In these 1977 regulations, the unasserted jurisdiction permit appeared only in part 322, *see* 33 C.F.R. § 322.4(g) (1977), which governed only section 10 of the River and Harbor Act. No unasserted jurisdiction permit appeared in part 323 which governed the permit program under the Clean Water Act.

Hence in 1977, when Cumberland first should have applied for a Corps permit pursuant to section 404 of the Clean Water Act, the unasserted jurisdiction nationwide permit plainly did not apply to Cumberland's activities since that nationwide permit clearly only applied to activities regulated under the River and Harbor Act.

In 1982, the Corps published interim regulations applicable to the permit programs under both the River and Harbor Act and the Clean Water Act. The revised regulations contained a new subsection, part 330, which codified all the previously

promulgated nationwide permits under either statute, as well as some newly proposed permits. The unasserted jurisdiction permit was moved to part 330. *See* 33 C.F.R. § 330.3(b) (1982). An introduction to part 330 stated

> The nationwide permits are issued to satisfy the requirements of both § 10 of the River and Harbor Act of 1899 and § 404 of the Clean Water Act *unless otherwise stated.*

33 C.F.R. § 330.1 (emphasis added). The unasserted jurisdiction permit, as recodified at 33 C.F.R. § 330.3 (1982), stated,

> The following activities are permitted by a nationwide permit which was issued on 19 July 1977 and need not be further permitted:
>
> . . . .
>
> (b) structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer was not asserting jurisdiction at the time the activities occurred provided, in both instances, there is no interference with navigation.

Thus the recodification of this permit did not expressly state that it applied only to section 10 of the River and Harbor Act. The omission of such a statement leads to Cumberland's present argument that, given the introductory section set out above, the permit applied to activities regulated under both statutes, since the recodified permit does not state otherwise.

The Corps replies that the unasserted jurisdiction permit was simply moved to the new part 330, without any intention that substantive changes be made, and that the permit continued to apply only to section 10 of the River and Harbor Act. In support of its position, the Corps points to language published in the Federal Register when these revised rules were first

proposed. *See* 45 Fed. Reg. 62,732 (Sept. 19, 1980). In the preamble to the proposed rules, the Corps stated that it would discuss each of its proposed changes that were significant, but that it would not discuss minor changes such as clarifications, new references or rearrangements. *Id.* The preamble went on to discuss every newly proposed nationwide permit. Also, whenever the scope of an existing nationwide permit was being expanded, the preamble discussed the extent of the expanded permit. For example, the preamble discussed an existing nationwide permit for bank stabilization work which originally applied only section 404 of the Clean Water Act. The preamble explained that the permit was being expanded to cover section 10 River and Harbor Act activities as well. *See* 45 Fed.Reg. 62,735, col. 3 (Sept. 19, 1980). Significantly, the discussion of permits that were being expanded never mentions the unasserted jurisdiction permit. Broadening the applicability of the unasserted jurisdiction permit to include a different statute was a major change. Had the Corps intended such a change, it is only reasonable to suppose that it would have discussed it, as it did in the case of the bank stabilization permit. We have little difficulty agreeing with the Corps, therefore, that it did not intend to extend coverage of the existing unasserted jurisdiction permit beyond the River and Harbor Act. Nonetheless, the lower court was undoubtedly right that the 1982 regulations was unclear on this score.

In November 1986, after the district court issued its decision in this case, the Corps expressly clarified its intent by specifying in the final regulations that the unasserted jurisdiction permit only applies to section 10 of the River and Harbor Act. *See* 51 Fed.Reg. 41,206 (Nov. 13, 1986).

Cumberland asserts that it must be allowed to rely upon the unasserted jurisdiction permit because an ordinary person reading the 1982 version of the Corps' regulations would not have known that this permit applied to only section 10 of the River

and Harbor Act. Cumberland points to the district court's observation that the Corps' regulation regarding this permit was so "opaque" that it vitiated Cumberland's legal culpability, leading the court, as a matter of discretion, to decline to impose a fine from 1977 to 1984, in which latter year the Corps first made it unequivocally clear that it asserted jurisdiction over Cumberland.

But while the court would not impose a fine for this period — a ruling from which the Corps has not appealed — we are unconvinced that the Corps' drafting errors in its 1982 regulations provides a basis for exempting Cumberland from its equitable duty to undo the consequences of illegal activities commenced in 1977. When in 1977 Cumberland first came under a duty to apply for a section 404 Clean Water Act permit, the Corps' regulations were perfectly clear that the unasserted jurisdiction permit provided no exemption to Cumberland. At the same time, the 1977 regulations unambiguously asserted the Corps' Clean Water Act jurisdiction over freshwater wetlands such as the Great Cedar Swamp.

It was only in 1982, after Cumberland had ignored and actively violated the Clean Water Act for five years, that the Corps recodified the regulations in such a way that a reasonable person might have thought that the unasserted jurisdiction permit covered Cumberland's work. Two years later, in December 1984, the Corps notified Cumberland that it asserted jurisdiction over the wetlands in question. This ended any exemption that an "unasserted jurisdiction" permit, if applicable, could have provided. Thus while Cumberland's activities from 1977 through 1985 were, absent a permit, plainly illegal, it was only for the brief period from 1982 to 1984 that any claim can be made to the protection of an unasserted jurisdiction permit.[5]

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[5] According to Cumberland's own representations, it did no dredging and filling at the site between the summer of 1983 and 1985. Since the ambiguous

We note, moreover, that the district court found that even after Cumberland was on notice, in 1984, that the Corps asserted jurisdiction, making the question of an unasserted jurisdiction permit irrelevant, Cumberland pressed forward in flagrant violation of the Clean Water Act. Given the inequitable behavior on the part of Cumberland and the lack of any evidence of reliance upon, or even knowledge of, the ambiguous regulation, *see* note 2, *supra*, we find that this short period of theoretical doubt cannot be used to excuse Cumberland from its equitable duty to reverse the harmful effects of its illegal activity.

We reject Cumberland's contention that the unasserted jurisdiction permit sheltered its illegal activities in the Great Cedar Swamp so as to relieve it from a duty to restore the property.

III. THE INJUNCTIVE RESTORATION ORDER

[4] Cumberland next asserts that, on principles of equity, the Corps should not be allowed to "retroactively" assert jurisdiction over its farmland, and so Cumberland should not have to comply with the injunction ordering the restoration of the Great Cedar Swamp to its 1977 condition. Cumberland asserts that when it began farming the 2,000-acre property, it intended to farm the entire property, and therefore it must be allowed to retain, in farmland, the wetlands it has converted since 1977. Cumberland apparently views the Corps' use of its enforcement authority under the Clean Water Act (albeit eight years after Cumberland's first violation) as an inequitable, retroactive assertion of jurisdiction. Under Cumberland's view, since it got away with these violations for eight years, the Corps is equitably foreclosed from enforcing the Clean Water Act once it finally discovered Cumberland's illegal activities.[6]

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rule was promulgated in July of 1982, only a year's activity at most could have occurred under the purportedly permissive rule.

[6] Throughout this enforcement action Cumberland has not asserted, nor has it pointed to, any statute of limitations which might preclude enforcement of the Clean Water Act.

There is no principle of equity that supports any such claim, nor do the two cases cited by Cumberland, *United States v. Context-Marks*, 729 F.2d 1294 (11th Cir. 1984), and *Buccaneer Point Estates, Inc. v. United States*, 729 F.2d 1297 (11th Cir. 1984), do so. In each of these cases a landowner began developing property, using dredge and fill, in order to build residential and/or marina facilities. The Corps sent letters to each developer, stating that his activities must cease and that he should obtain a Corps permit because the area being developed was within the Corps' jurisdiction. The developers did no further work on the projects in reliance upon these letters. Subsequently, the Corps determined that the area being developed was *not* in fact covered by the Corps' regulatory authority and that the corps did not require permits for the developers' activity. Very shortly thereafter, however, the Corps amended its regulations, expanding its jurisdiction to cover the developer's activities. The Corps then demanded that the developers obtain a permit pursuant to section 404 of the Clean Water Act. The Eleventh Circuit held that the two developers would not be required to get a permit because the evidence showed that if the Corps had not erroneously asserted jurisdiction, and if the developers had not ceased their activities in response to the Corps' erroneous cease and desist order, the two projects would have been completed *prior* to the promulgation of the Corps' new regulations which expanded jurisdiction.

These two cases are altogether different from the present. There, the developers would have completed their projects, for which permits were not then required, had the Corps not *erroneously* asserted jurisdiction. It was arguably inequitable to allow the Corps to utilize its subsequently enhanced jurisdiction to burden the stalled projects.

Such, however, is not the case with respect to Cumberland's activities in the Great Cedar Swamp. The Corps is not relying

on a retroactive assertion of jurisdiction. The Corps had jurisdiction from 1977 on, its jurisdiction having been enlarged to cover freshwater wetlands. Cumberland was accordingly required by law in 1977 and thereafter to obtain a Clean Water Act permit. Cumberland never obtained a permit but continued its dredge and fill activities in violation of law. The Corps is not retroactively asserting jurisdiction, but rather is properly seeking enforcement of the Clean Water Act from the date that Cumberland first violated the act. Cumberland points to no evidence that it would have converted the full 2,000 acres prior to 1977, and that the Corps' actions somehow delayed implementation of that timetable.

There is no merit in Cumberland's assertion that simply because it planned, in 1972, eventually to convert the entire 2,000 acres of wetland to farmland, that it should be excused from complying with the permit requirements of the Clean Water Act which became applicable to Cumberland's property in 1977. Cumberland was then required by law to apply for and obtain a permit but never did so. Cumberland's unarticulated future intentions for the property cannot be used to preclude the application of the federal law.

Cumberland further contends that the court should not have delved into the details of a restorative order, but should have simply issued an order to prevent the further work and remanded the matter to the Corps for further administrative proceedings through an after-the-fact permit application. Processing such an after-the-fact permit would require an administrative hearing which would ensure public participation. Cumberland argues that the Corps' regulations evince a clear agency policy that the program of regulating wetlands should consider the full public interest by balancing the favorable and detrimental impacts of a proposed activity. *See* 33 C.F.R. § 320.1(a). Cumberland asserts that such a balancing of public interests can be best accomplished through an after-the-fact permit process.

The regulations that Cumberland points to as evincing a policy of public participation through an administrative hearing are primarily concerned with permit applications for *proposed* projects that will occur in wetlands.[7] The present circumstances do not easily fit within the frame of a proposal stage proceeding. In the latter, there is more time to solicit public input and to weigh competing values before authorization of the proposed project. Here, there was a serious, ongoing violation of the Clean Water Act, as to which the Corps' regulations, found at part 326, "Enforcement, Supervision and Inspection," are more on point. Under part 326, the regulations make it clear that the Corps will consider an after-the-fact permit only if the violator has completed interim remedial work which the Corps deems necessary to protect public resources. In the present case, Cumberland refused to comply with the Corps' interim remedial order, which was designed to restore the area to its 1977 wetland condition, "unless and until some higher authority determines that to be an appropriate result." Therefore, the Corps refused to consider an after-the-fact permit for Cumberland's activities.

The Corps' enforcement regulations' subsection entitled "Administrative action" states,

> *Remedial work.* (1) The district engineer shall determine whether as a result of the unauthorized activity, life, property or important public resources are in serious jeopardy and would require expeditious measures for protection.

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[7] While primarily designed for proposed projects, these same regulations do apply to an after-the-fact permit process. However, as the regulations make clear, *see infra*, the Corps considers such after-the-fact applications only after any environmental damage has been ameliorated through implementation of necessary interim protective measures. Thus, for those after-the-fact applications where the violator has protected against further environmental damage, the Corps can take the time to convene hearings to consider the public's views. Such is not the case here. *See infra*.

> Such measures may range from minor modification of the existing work to complete restoration of the area involved. . . . If the district engineer determines that immediate remedial work is required, he shall issue an appropriate order describing the work, conditions and time limits required to provide satisfactory protection of the resource.

33 C.F.R. § 326.3(b). Thus the district engineer is expected to issue such remedial orders as he deems necessary, and such orders may range, as necessary, from minor modifications to complete restoration of the wetland, which was the case here.

Under the subsection entitled "Acceptance of an after-the-fact application," 33 C.F.R. § 326.4(c), the regulations clearly require the remedial work be completed before the Corps will accept an after-the-fact permit application.

> Upon completion of appropriate remedial work, if any, the district engineer shall accept an application for an after-the-fact permit for all unauthorized activities unless:
>
> (1) Civil action to enforce an order issued pursuant to § 326.2 or § 326.3(b) [remedial orders] is required. . . .

The regulations also clearly set out the Corps' enforcement policy that in exceptional circumstances, *i.e.*, knowing, flagrant, repeated or substantial impact violations of the Clean Water Act, the Corps shall seek civil penalties, as was done in this case. The regulations state that the district engineer may recommend to the United States Attorney that a complaint seeking such civil penalties to be filed and that "[a]n after-the-fact application should not be accepted until the enforcement action is completely resolved." 33 C.F.R. § 326.4(c)(4).

Thus, contrary to Cumberland's assertions, the Corps was acting well within its enforcement policies as articulated in its

regulations. When Cumberland refused to comply with the Corps' remedial order, and instead continued further destruction of the wetland, the Corps was within its rights, and indeed was left with no other recourse, but to seek judicial enforcement of the remedial restoration order, rather than to process administratively an after-the-fact permit.

Cumberland's reliance upon the primary jurisdiction doctrine is similarly misplaced. The doctrine of primary jurisdiction helps to define the relationship between courts and administrative agencies by recognizing that if an agency adjudicatory proceeding is ongoing, courts will usually not interfere until the administrative process is complete. By suspending the judicial process, appropriate issues can be referred to the agency for its special expertise, and courts will not prematurely interfere with the administrative process. See *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956). As discussed above, however, under the Corps' regulations no further administrative proceedings are pending, nor can the Corps entertain any further permit proceeding until Cumberland complies with the interim orders, which Cumberland refused to do. Thus the district court was not impermissibly interfering with the Corps' administrative process. Rather it was the Corps itself which sought the aid of the district court after Cumberland had ignored the Corps' cease and desist order and had refused to implement the protective measures. Moreover, in fashioning the remedy, the court had the full benefit of the Corps' expertise through the Corps' proposed restoration plan, which the court adopted with only a few changes.

Cumberland presents no authority for the proposition that the district court lacked authority to issue a restoration order. The Clean Water Act authorizes the commencement of a civil action "for appropriate relief, including a permanent or temporary injunction." 33 U.S.C. § 1319(b) (1983). We believe that

the district court had authority to issue such restorative orders so as to effectuate the stated goals of the Clean Water Act "to maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251 (1983). *See Weinburger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (under section 1319 of Clean Water Act, district court not required to order injunctive relief but is permitted to exercise equitable discretion to order relief that will achieve compliance with the act). In *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960), the Supreme Court held that under section 10 of the River and Harbor Act, district courts had the authority to issue injunctive restoration orders despite the lack of explicit statutory authority to do so.

> Congress has legislated and made its purpose clear; it has provided enough federal law in section 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

Id. at 492, 80 S.Ct. at 890.

Cumberland further attacks the substance of the restoration order, arguing that it is speculative and untested, will cause harm to third parties and is inequitable. The district court issued an injunctive order that the converted area be restored to its 1977 condition after finding that the restoration order (1) would confer maximum environmental benefits; (2) was achievable as a practical matter; and (3) bore an equitable relationship to the degree and kind of wrong that it is intended to remedy.[8] *See United States v. Sexton Cove Estates*, 526

[8] The government did not object to the district court's use of this three part test for determining the appropriateness of a restoration order. On appeal, the

F.2d 1293, 1301 (5th Cir. 1976); *United States v. Weisman*, 489 F.Supp. 1331, 1343 (M.D.Fla. 1980).

[5] We review an award of injunctive relief only for an abuse of discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973); *Pino v. Protection Maritime Insurance Co.*, 599 F.2d 10, 16 (1st Cir.), *cert. denied*, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979). Any findings of fact, upon which the court's exercise in discretion is based, will stand unless clearly erroneous. *See Fortin v. Commissioner of Massachusetts Department of Public Works*, 692 F.2d 790, 794 (1st Cir.1982). We find no abuse of discretion here.

[6] The district court carefully considered the possible detrimental impact of the proposed order, but found that the beneficial aspects of the restoration order outweighed the possible detrimental aspects. The court found that restoration of the site to its 1977 status would assist in flood control; would significantly improve the functioning of the area as a biological filter; and would have a direct improvement on wildlife habitat. The court found that the restoration was in the public and national interest and would maximize environmental benefits.

The district court further found that the restoration order proposed by the Corps was "technically competent and innovative." 647 F.Supp. at 1183. Cumberland's contention that the district court abused its discretion by ordering a "speculative" plan is unfounded. The court was presented with testimonial evidence that the first two facets of the plan, reestablishing the wetland topography of hollows and hummocks, and raising the water table to 1977 levels were necessary in order to restore the wetland. The third step of spreading strips of vegetation,

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government urges that a less demanding test is appropriate. However, the government's acquiescence on this point before the district court forecloses the issue here, and we shall not address it. *See Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979).

taken from a nearby swamp so as to provide for the regeneration of diverse species is, as the court found, innovative. However, it is not so speculative as to taint the injunctive order. The Corps presented testimony by an ecologist who had been involved in a great number of wetland restoration projects, some of which used the technique of borrowing plant material from nearby wetlands to be used as a plant source. He testified concerning the successes reached in these prior restoration projects. The ecologist testified that he thought the restoration plan in this case was achievable as a practical matter, and was an "average plan in terms of the degree of difficulty" as compared with other restoration plans he had worked on. While none of the prior successful restorations dealt with exactly the same situation, clearly the court had enough evidence before it to evaluate the practicality of this "innovative" approach.

Cumberland asserts that it would be inequitable to enforce the order because, according to Cumberland, it will have a detrimental effect on the nearby cranberry bogs and on five houses that were built near the wetland after it was drained and converted to farmland. The court was well aware of these potential problems, and adequately protected those interests. The Corps presented testimony concerning the potential detrimental impacts on the cranberry bogs. The court modified the Corps' proposed plan, altering the locations of proposed "check dams," in order to better protect the nearby cranberry growers.

As to the nearby houses, the court was sensitive to possible adverse effects, but felt the balance should be struck in favor of enforcing the Clean Water Act which had been violated since 1977. We note that through testimony and an elevation survey, the Corps presented evidence that the possibility of detrimental effects on the houses from the raised water table is minimal.[9]

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[9] The Corps submitted, as part of its memorandum in support of the restoration order, a survey of elevations of the recently built houses, to which Cumberland

Finally, Cumberland asserts that it is inequitable to enforce the restoration plan because it will have the effect of inundating its valuable farm fields. The district court was careful to protect any fields Cumberland had converted prior to 1977, modifying the proposed plan to better protect those fields. To be sure, in the area converted since 1977, the restoration order places a heavy burden on Cumberland. However, Cumberland has no one but itself to blame for that burden.

Had Cumberland complied with the Clean Water Act when the Act first became applicable to its activities in 1977, no such burdensome order reversing the many years of illegal activity would have been necessary. Moreover, Cumberland's intentional, unlawful conversion activities continued even after the Corps actively tried to get Cumberland's cooperation in complying with the law. We believe the district court did not err in finding that the restoration order bore an equitable relationship to the degree and kind of wrong which it is intended to remedy.

Affirmed.

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did not object. The survey showed that the lowest base elevation of the houses was 41.89 NGVD (National Geodetic Vertical Datum, essentially the elevation above designated sea level). Testimony by one of Cumberland's witnesses was that the cellars of these houses would extend seven feet below ground, *i.e.*, at approximately 34 feet of elevation, and that septics would extend six feet below the surface, *i.e.*, approximately 35 feet of elevation. Testimony at trial showed that the water table on Cumberland's land would be raised, by filling ditches and constructing check dams, to approximately 26 to 28 feet, or perhaps during flood stages to 30 feet of elevation.

Appendix C.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he deter-

mines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and oportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities inovlving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit

have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purposes of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirement of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer

in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies as such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited

BEST AVAILABLE COPY

to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator received notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the

Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secreatry, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such programs, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsec-

tion and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary received notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under section (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the

program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the

Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to the subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the proceeding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type or size within such category) of discharge within the State submitting such program.

(l) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under the subsection (b)(1)

of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant

is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4)(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(B) For the purposes of this paragraph, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(5) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

(June 30, 1948, c. 758, Title IV, § 404, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 884, and amended Dec. 27, 1977, Pub.L. 95-217, § 67(a), (b), 91 Stat. 1600.)

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[1] So in original. Probably should be "action".

Appendix D.

33 C.F.R. § 326.3(c)

(c) *Acceptance of an after-the-fact application.* Upon completion of appropriate remedial work, if any, the district engineer shall accept an application for an after-the-fact permit for all unauthorized activities unless:

(1) Civil action to enforce an order issued pursuant to § 326.2 or § 326.3(b) of this part is required;

(2) Criminal action is appropriate (see § 326.4a(1) of this part);

(3) State local, or other federal authorization or certification has been denied, or a state or local enforcement action is pending. In the above situations, the District Engineer may accept an after-the-fact permit application provided he believes it would be in the public interest and he obtain approval of the next higher authority.

(4) In some cases, a violation of the Clean Water Act may be of such a nature that it is appropriate to seek a civil penalty as provided for in the act. These cases include knowing, flagrant, repeated or substantial impact violations.

(d) If the responsible party fails to submit an application as noted in paragraph (c) of this section within a reasonable time period, the district engineer may proceed on his own initiative with a determination of whether the activity is in the public interest. The determination will be made in accordance with appropriate procedures described in 33 CFR Parts 320 through 325.

Appendix E.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
J.F. KENNEDY FEDERAL BUILDING, BOSTON,
MASSACHUSETTS 02203

August 4, 1987

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mr. Russell Thomas
Off Cape Cranberry Corporation
Post Office Box 131
North Carver, Massachusetts 02355

Dear Mr. Thomas:

Region I of the United States Environmental Protection Agency (EPA) has learned that you have discharged fill material into wetlands of the Snipatuit Brook and Pond system and an adjoining unnamed stream. The location of this site is on Snipatuit Road in Rochester, Massachusetts. This activity is a violation of the Clean Water Act (Act), and the enclosed Administrative order requires that you remove the fill from the wetland area.

A permit from the United States Army Corps of Engineers is required under Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), for the discharge of dredged or fill material into all waters of the United States, including wetlands. You have not received a federal permit for this discharge and are in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). The EPA has authority under Sections 309(a), 309(b), 309(g), 33 U.S.C. §§ 1319(a), 1319(b), 1319(c), and 1319(g), to pursue administrative and judicial enforcement action for past and continued violations. The enclosed Order requires your prompt attention to this matter.

Please note that this Order requires that you submit a removal plan within 21 days of receipt of this letter and achieve full compliance by September 30, 1987. Should you have any questions regarding this matter, please contact Matthew Amorello at 617-565-4437.

Sincerely,

/s/David A. Fierra

David A. Fierra, Director
Water Management Division

Enclosure

cc: See attached list

No. 87-840

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CUMBERLAND FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No 87-840

CUMBERLAND FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Takings Clause of the Fifth Amendment requires the United States Army Corps of Engineers to allow petitioner, which has filled wetlands without a permit in violation of Sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311(a), 1344, to maintain the wetlands in their illegally filled condition and to file an after-the-fact application for a permit.

1. a. In June 1985, the United States brought this suit in the United States District Court for the District of Massachusetts against petitioner to enforce the Clean Water Act's prohibition on the unauthorized discharge of dredged or fill material into wetlands. Section 301(a) of the Clean Water Act bars the discharge of dredged or fill material into the waters of the United States, including wetlands, absent a permit issued by the Army Corps of Engineers pursuant to Section 404 of the Act (see 33 U.S.C. 1311(a), 1344). See generally *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The complaint concerned extensive portions of wetlands

located in the Great Cedar Swamp in southeastern Massachusetts that petitioner had filled since July 1977. Only petitioner's post-July 1977 filling activities were at issue because the wetlands were not covered by Corps regulations until that date. Pet. App. 1a-13a.

Following a trial on liability, the district court ruled (Pet. App. 13a-27a) that since July 1977 petitioner had violated the Clean Water Act by filling wetlands without first obtaining a Section 404 permit. The court rejected (Pet. App. 14a-20a) petitioner's contention that its activities fell within the scope of a limited exemption available under the statute for certain types of farming activities. The court also rejected (*id.* at 21a-27a) petitioner's assertion that its activities were authorized by either of two "nationwide permits" issued by the Corps pursuant to its rulemaking authority under the Clean Water Act.

Following a second trial on remedy, the district court issued (Pet. App. 27a-34a) a mandatory injunction requiring petitioner to implement a plan developed by the Corps for the purpose of restoring the Great Cedar Swamp to its condition as of July 1, 1977. The court, however, modified (*id.* at 29a-34a) the Corps' plan in several respects to avoid, for example, any damage to pre-existing cranberry bogs nearby and also to reduce possible harm to petitioner's existing fields. Finally, the court fined (*id.* at 34a-38a) petitioner pursuant to Section 309 of the Clean Water Act, 33 U.S.C. 1319, based on petitioner's intentional and repeated violations of orders issued by the Corps beginning on December 28, 1984. The court concluded (Pet. App. 35a), however, that petitioner should not be fined for its illegal activities before that date.

b. The court of appeals affirmed (Pet. App. 39a-67a), upholding both the district court's liability determination and its remedy order. The court rejected (*id.* at 58a-64a) petitioner's contentions that the district court's restoration order is contrary to "principles of equity," inconsistent

with the Corps' procedural regulations and the doctrine of primary jurisdiction, and not authorized by the Clean Water Act. In upholding (*id.* at 64a-67a) the substance of the restoration order, the court of appeals concluded (*id.* at 65a) that "[t]he district court [had] carefully considered the possible detrimental impact of the proposed order, but found that the beneficial aspects of the restoration order outweighed the possible detrimental aspects." The court specifically found (*id.* at 66a-67a) that the district court had adequately protected nearby cranberry bogs and homes and also had been careful to protect petitioner's pre-existing farm fields.

2. The decision of the court of appeals is correct and it does not conflict with any decision of this Court or of any other court of appeals. The issues raised in the petition for a writ of certiorari, moreover, do not appear to have been raised, and were not decided, in either the district court or the court of appeals. Accordingly, further review is not warranted.

Petitioner claims (Pet. 7-9) that the restoration order violates the Takings Clause's prohibition on governmental takings of private property without just compensation. Petitioner, however, does not appear to have raised the taking issue in either the district court or the court of appeals and neither court addressed that constitutional claim. Hence, the taking issue is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Miree* v. *DeKalb County*, 433 U.S. 25, 34 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

In any event, petitioner's taking claim lacks merit for two reasons. First, petitioner plainly possesses no constitutionally protected property right to maintain property in a condition that resulted from petitioner's illegal activity. Both courts held (Pet. App. 14a-27a; *id.* at 47a-58a) that

petitioner illegally filled wetlands on its property—petitioner does not dispute that ruling here—and, as the court of appeals held (*id.* at 58a-67a), the district court did not abuse its discretion in determining that restoration was required to redress the violation.

Second, any takings claim petitioner may have will be ripe only after petitioner applies for a Section 404 permit to fill the area and then only if the permit is denied. Petitioner's sole recourse in that event will, moreover, be to bring suit in the United States Claims Court for damages pursuant to the Tucker Act, 28 U.S.C. 1491. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. at 128. In no event, therefore, may petitioner raise such a constitutional claim in the current proceeding.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

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* There is no merit to petitioner's suggestion (Pet. 7) that a different result should obtain in this case because the cost of complying with a restoration order in other cases might bankrupt the landowner. Even if the threat of bankruptcy might somehow excuse compliance with a remedy necessary to redress illegal conduct, the possibility that *other* landowners in *other* circumstances might suffer such harm presents no ground for excusing petitioner in this case. Petitioner did not contend in the lower courts that bankruptcy would result from compliance with the restoration order and, accordingly, there is no evidence in the record that petitioner would suffer such adverse economic consequences. Equally unavailing is petitioner's claim (*id.* at 8) that the Tucker Act does not apply "when the action that causes the 'taking' comes about as a result of an order of a district court." A judicial construction of the requirements of a federal statute does not insulate the statute from possible claims that its application is somehow unconstitutional in a particular case. Of course, in this case, there is in any event no basis on the merits for any such constitutional challenge.

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